DOCUMENT RESUME

ED 067 995 HE 003 420

AUTHOR	Strong, Frank R.; And Others
TITLE	Director's Evaluation Report on the Law Teaching Clinic of 1971.
INSTITUTION	Association of American Law Schools, Washington, D.C.
SPONS AGENCY	Office of Education (DHEW), Washington, D.C.
BUREAU NO	Proj-69-0657-1
PUB DATE	[72]
NOTE	443p.
EDRS PRICE	MF-$0.65 HC-$16.45
DESCRIPTORS	*Higher Education; *Institutes (Training Programs); *Law Instruction; Law Schools; Professional Occupations; *Professional Training; Professors; Teacher Education; *Teacher Improvement

ABSTRACT

The Law Teaching Clinic was held at the University of Wisconsin in 1971 and sponsored by the Association of American Law Schools. Law teachers attending the clinic were chosen because of their limited law teaching experience; their willingness to read the advance materials and spend three weeks at the clinic; and the approval of the dean of their law school. The first two weeks of the clinic were devoted to analysis of the teaching-learning operation through lecture, discussion and demonstration, followed by three days of direct experience with supervised practice teaching. The last week was devoted to issues in legal education (student-teacher interaction and the educative elements in law). The book of readings for the clinic accompanies the report. (Author/CS)

ED 067995

DIRECTOR'S EVALUATION REPORT

on the

LAW TEACHING CLINIC

of

1971

Grant No. 78, NIH #74-6390
Project No. 69-0657.1

I. BASIC INFORMATION

A 1 Grantee Institution	The University of North Carolina Chapel Hill, North Carolina 27514
A 2 Host Institution	The University of Wisconsin Madison, Wisconsin 53706
A 3 Sponsorship	The Association of American Law Schools One DuPont Circle Washington, D. C. 20036
B Designation	Law Teaching Clinic of 1971 Special Project #69-0657.1 under Part V E, Education Professions Development Act of 1965
C 1 Director	Frank R. Strong, Cary C. Boshamer Distinguished Professor, University of North Carolina School of Law, Chapel Hill, North Carolina 27514 Telephone 919-933-5106 ext. 25
C 2 Assistant Director	Richard M. Smith, Associate Professor, University of North Carolina School of Law, Chapel Hill, North Carolina 27514 Telephone 919-933-5106 ext. 21
D Program Location and Dates	July 26, 1971 through August 13, 1971 Madison, Wisconsin

HE 003420

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY

FILMED FROM BEST AVAILABLE COPY

IIA. PROGRAM FOCUS

The primary basis for recruitment and appointment of law teachers in the United States is demonstrated superiority in legal acumen. This outstanding quality is determined from law-school record, performance in the private or public practice of law, selected references, and faculty interview. Beyond this, attempt is made to gauge the depth of interest in the teaching of law and the likelihood of success in law teaching; but these attempts are highly subjective, severely limited, and quite superficial. The consequence is that those qualifying for law teaching are highly skilled in the law yet (with occasional exceptions) untrained in teaching save as they have as law students observed the teaching of their instructors. The essential purpose and function of The Law Teaching Clinic of 1971 was to supply, for those early in their careers as teaching lawyers, some of this lack. The program focus was therefore on the teaching-learning process - learning theories; educative elements in the cognitive learning of law; awareness of emotive factors in the student-teacher relationship and development of coping capacity; appreciation of the presence of similar emotive factors in attorney-client relationships and of the importance of affective as well as cognitive learning; the place of conative learning in law study. Such focus emphasizes attention to attitudinal considerations and classroom methods and skills. Development of substantive legal knowledge is involved only as a means to these ends, but there is definite intent to acquaint the law teacher with elementary psychological and psychiatric knowledge pertinent to the learning process.

IIB. PROGRAM FORM

The focus to be given the program for the 1971 Law Teaching Clinic was succinctly set forth in a brochure, copy of which will be found in the Appendix. Copies of this brochure were in late November of 1970 made available to interested law teachers through mailings to all law schools of the United States enjoying the approval of the American Bar Association. Other copies were widely distributed at the 1970 annual meeting of the Association of American Law Schools. Mailings in the early months of 1971 were made to newly appointed law teachers as their names and addresses were provided by the employing schools.

The Clinic Program itself, copy of which is provided in the Appendix, discloses in considerable detail the manner in which the Clinic's focus was achieved. The entire first two weeks of the Clinic were wholly devoted to analysis of the teaching-learning operation, first by lecture, discussion, and demonstration followed by three days of direct experience with supervised and critiqued practice teaching. The last week of the Clinic was devoted to issues in legal education closely related to, if not stemming from, the central focus on the dynamics of student-teacher interaction and of the full range of educative elements in law.

III. PROGRAM OPERATION

A. Participants.

Selection criteria for registration of Participants were essentially four: commitment to law teaching as a professional career; age, in terms not of chronology but of years of experience in the teaching of law; willingness to devote the time necessary for study of the Advance Materials as well as full time during the three weeks of the Clinic; and approval of the Dean of the School involved. Commitment to law teaching was judged on the basis of contractual obligation to a law school approved by the American Bar Association. One exception was made in the case of an able political scientist with a year's graduate study at the Yale Law School. Eligibility beyond the first criterion ranged from those under contract to commence law teaching in the Fall of 1971 to those completing four years of law teaching. The third criterion was met by acceptance of the written assurance of the applicant that he or she was ready, able and willing to give the time and energy required. Approval by the Dean of the applicant's School was judged by the Dean's commitment to pay an assessment of $200 required in the case of each Participant in order to defray necessary costs not covered by the NIH grant.

A considerable number of potential eligibles displayed interest in the program as proposed, to the extent of registering a tentative desire to attend. Ultimately, nearly 70 made application and were accepted. However, late developments caused or forced several to withdraw, leaving a final Participant total of 58. These represented law schools of every sector of the Nation and of every major type - day, evening, private, public. Again conspicuously absent, as in 1969, were Participants from the most prestigious Schools. Competing summer opportunities for younger members of the faculties of such Schools and, frankly, an attitude prevailing at these Schools that their "superior" faculties do not need the Clinic experience appear to explain the situation. Because some of the other projects sponsored by the Association of American Law Schools are of primary value to the "name schools," there is educational strength in the fact that the Teaching Clinic largely serves the other law schools which in numbers graduate the greater percentage of those entering the legal profession. Of the 58 Participants from 44 Schools, 3 were Black; one of these 3 was a female, and there were 3 other women. 14 begin the teaching of law this Autumn; the remainder had had one, two, or three years of experience.

The Faculty-Participant ratio was approximately 1 to 4, translating the part-time Resource Specialists into full-time equivalency. This excellent ratio made possible opportunities for much effective personal interchange in the many small-group sessions, at meals, and at other times. These opportunities were constructively and fully exploited, and without question constituted one of the greatest strengths of the Clinic experience. This experience is clearly expensive, measured on a per capita basis, yet a ratio of some such dimension is essential to the realization of the significant values the Law Teaching Clinic has to offer.

Returning to the matter of criteria for choice of Participants, it is the judgment of the Director and of a clear majority of Faculty and Participants at both the 1969 and the 1971 Clinics that the instructor with law teaching experience tends to be more fully benefited than does the neophyte. This is not to suggest abandonment of eligibility for the beginner; testimony and other evidence indicates that the benefits for him are great. Rather, it is to recommend that for any future Law Teaching Clinic eligibility be broadened to include any applicant who satisfies the other selection criteria substantially without regard to the length of his teaching experience. There is much reason now to believe that the values the Clinic can give are largely related to factors other than either chronological age or years of law teaching.

III. PROGRAM OPERATION (continued)

B. Staff.

The instructional, administrative, and secretarial staff for the 1971 Law Teaching Clinic is listed in a section of the Appendix. During the months of preparation for the Clinic, the Director gave many hours to planning and organization; the Assistant Director, the Chairman of the Advisory Committee, and the Executive Secretary devoted substantial amounts of time to Clinic correspondence, budgetary detail, registration of Participants, housing arrangements, etc.; Resident Faculty prepared themselves for their respective instructional roles; and the Resource Specialists worked up materials and presentations in keeping with their special assignments. Special mention should be made of the great assistance provided by the Law Center of the University of North Carolina in the form of a travel grant that made possible a week of planning sessions in June of 1970 attended by members of the Resident Faculty; during those sessions and in subsequent months Dr. Robert Redmount was of marked assistance to the Director in detailing the educational base of the program as outlined in the planning sessions and in preparing a functional overview of the learning process used as the leading article in the Advance Readings provided all Participants some five weeks prior to the opening of the Clinic.

During the three weeks of the Clinic itself, the three Administrators, the Resident Faculty, and the Receptionist-Secretary were full-time, whereas the Resource Specialists gave an average of approximately two days each. In terms of total impact, the Resident Faculty were necessarily most effective; their respective contributions constituted the heart of the program. Yet experience with two Clinics is convincing of the additional values that can be provided by carefully selected specialists. The special contributions they can make even on a severely restricted time basis, especially in the small-group sessions, are very impressive and clearly justify this programming feature.

Interdisciplinary impact of major value to the success of the Clinic was realized through having on the Faculty a number of men trained in social science or behavioral science disciplines. Among the Group Leaders was Robert Rabin, who holds the Ph.D. in Political Science as well as the J. D.; among the Resource Specialists, Dr. Jack Ladinsky, a member of the Department of Sociology of the University of Wisconsin. The primary interdisciplinary relationships were achieved by the inclusion on the Resident Faculty of two men not law teachers by major profession or practice. One was Robert S. Redmount, Ph.D. in Psychology, New York University, and J. D., Yale, a practicing clinical psychologist of Hamden, Connecticut. The other was Andrew S. Watson, M. D., Temple University, who holds a joint appointment as Professor of Psychiatry and Professor of Law, University of Michigan. Although Dr. Redmount has never served as a law teacher, he has written extensively in the area of law learning in both legal and psychological journals. Dr. Watson does engage in some team teaching with law professors but his professional interest lies in study of interpersonal reactions whether between law students and law teachers or between those in other relationships. It is quite impossible to over-emphasize the impact these able men had on Participants, through their own more formal presentations or demonstrations, in exchanges with other Faculty during panel discussions at the general sessions, and in the course of their active participation in discussions of the small-group sessions. Dr. Watson was the better received by the Participants, in part because he has now had nearly twenty years of continuing contact with law students in two major law schools. However, this Report has already testified to the great assistance in shaping the program given by Dr. Redmount; and while he did not come through as well in the general sessions for a number of Participants, the Participant evaluations indicate that he was effective through his writings and in the small groups where there existed greater possibility of resolving the problem of cross-disciplinary communication.

Proper emphasis on the unique contributions made by the four men singled out in the paragraph immediately preceding is not meant to carry a negative implication regarding other Resident Faculty and Resource Specialists. All were effective each in his own way in his appointed role. Without minimizing the contributions of the other law teachers who made up these two groups, one may single out Professor Harry Jones, Cardozo Professor of Jurisprudence at Columbia University School of Law, Professor Willard Hurst of the Law Faculty of the University of Wisconsin, and Professor Kenneth S. Tollett, newly named Distinguished Professor of Higher Education at Howard University. Professor Jones, concededly one of the great law teachers of our time, was effective throughout the three weeks both in all his program assignments and in the continuing informal dialogue he had with individual Participants. Professor Hurst, acclaimed by many as the country's leading legal historian, was superb in his remarks on the research role of the law teacher. And Professor Tollett, certainly one of the recognized Negro legal educators, provided during the Clinic's last day a sensitive yet balanced appraisal of the problems of the minority law student. The Director sincerely registers his appreciation of the contributions of all the Faculty, which together made the 1971 Law Teaching Clinic a most worthwhile experience for Participants.

III. PROGRAM OPERATION (continued)

C. Activities.

The major activities in the training program were three in number: (1) consideration of major facets of the teaching-learning process as it operates in law instruction; (2) opportunity for practice teaching under supervision and with subsequent critique; and (3) consideration of major institutional relationships in which the individual law teacher must necessarily be involved. The Program discloses the time allocations that were made: seven working days for (1), three for (2), and five for (3). The first segment was satisfyingly successful. Although quality varied to some extent, each facet was well presented in general session and effectively discussed in the small-group sessions.

The segment of three days devoted to preparation for, direct experience in, and critique of practice teaching did not meet expectations in one respect. The University of Wisconsin course schedule for the second half of the summer session had few courses adaptable to practice teaching by Participants, and hopes to attract students to "practice classes" did not materialize. In consequence, although two regular classes were taught by Participants, for the most part the Participants themselves had to constitute the experimental classes. This circumstance somewhat detracted from the reality of the practice exercises. Even so, however, many of those Participants who taught a class found the experience profitable. Most practice sessions were video taped, with opportunity for critique based upon early replay; this feature was well regarded and constituted a major advance over the 1969 Clinic. The immeasurable detail in coordinating this effort was well executed by Dean Richard Huber, Coordinator, and the complicated arrangements for extensive video recording and replay well carried through by Assistant Director Richard Smith.

Participant reaction to presentations during the third segment of the Program varied considerably. In the Director's judgment this reaction was only in part responsive to variation in quality; there was considerable intellectual weariness after two intensive weeks, making it difficult to get Participants "up" for the final week. Curriculum Day was overloaded, the fault of the Director, and the Tuesday session on Examinations and Grading suffered from both resistance to mathematics and imbalance in coverage of the Day's topics. Wednesday, on the contrary, was most successful with a superb presentation by Professor Willard Hurst of the Law Faculty of the University of Wisconsin on the research role of the law teacher, followed by effective advocacy of empiric research about law by Professor Maurice Rosenberg of Columbia University School of Law. The three topics of the last two days were effectively presented through panels featuring among other outstanding Resource Specialists Chancellor Kenneth Pye of Duke University, Professor Kenneth Tollett of Howard University, Executive Director Michael Cardozo of the Association of American Law Schools, and Dean Phil Neal of the University of Chicago Law School.

A major effort was made in the general sessions to substitute, for lecture-type presentations about teaching theory and practice, actual demonstrations of cognitive, emotive, and operational facets of teaching. For this purpose much use was made of films, cassettes, and video tapes. The films drawn from the "Great Teacher Film" series were disappointing because the original prints have been worn from seven years of continuing use. New prints are essential but have not been possible for lack of funds. The video tapes were not as effective as hoped, partly because of the inferior quality of rental equipment available but also for the reason that this medium is difficult to employ effectively for demonstration purposes without the aid of expert programmers and technicians. Demonstrations by audio tapes used with cassette players are far more easily produced and proved quite effective. However, the video tape has great potential which can be realized through development of greater skill in production. As earlier remarked, the recording on video tape of Participant practice teaching, thus enabling later playback for purposes of critique, was a most successful feature of the Clinic even with inferior equipment and inexpert cameramen.

The setting of satisfactory commencing and ending dates for a Law Teaching Clinic is difficult because of differences in the Summer and Fall semester scheduling patterns of law schools. An ending by mid-August appears required in order to provide a breather precedent to the opening of many universities before the end of August. On the other hand, the opening date should be as delayed as possible in order to lessen competition of the Clinic with other, especially income-producing, summer opportunities in teaching, research or practice. These considerations combine with the intensity of the Clinic experience itself to suggest three weeks as the outside length and two-and-a-half weeks as a period to be seriously considered. The four weeks of the original Clinic of 1969 were overlong in the judgment of everyone. Some Participants and even Faculty of the 1971 Clinic believe the three weeks were a bit long, yet many others did not find the period excessive.

The Clinic program may have been overloaded in terms of structured time, especially during the final week. This criticism appears in some of the Participant evaluations. Yet as the overall Clinic period is shortened, there is pressure to fill the days available to the end that the coverage be adequate. If most evenings and the weekends are left entirely unstructured, save for occasional social activities, a six-hour academic day is warranted. From observation of the use of the Clinic Library during the first two weeks, the Director was impressed with the amount of time devoted by Participants on open evenings to consideration of reference materials available to them in addition to reading assignments. Equally impressive were the great number of ad hoc discussions of Clinic topics both among Participants and between Participants and Faculty beyond the opportunities provided in the afternoons through the small-group sessions. Where Participants and Faculty are housed in the same living unit, a 24-hour day provides many occasions of this type without overburdening any individual.

The focus as well as the length of the 1971 Law Teaching Clinic were determined in part from constructive criticism of the initial, 1969 Clinic by Participants in it. That criticism was consolidated from the 1969 Participant evaluations, from helpful letters of appraisal written by several of those Participants, and from oral comments made at an evaluation meeting called in September of 1969 by the Executive Committee of the Association of American Law Schools which was attended by representative Participants as well as the Director and the Assistant Director of that Clinic, the Chairman of the Clinic's Advisory Committee, and three members of the 1969 Clinic Faculty. In the operation of the 1971 Law Teaching Clinic, Participant involvement was effected largely through the small-group sessions; although the Group Leaders supplied minimum structuralization and continuing leadership, each gave to his Participants opportunity both to choose lines of inquiry to be followed and to direct much of the discussion. One topic set for a portion of an afternoon general session was dropped and some other adjustments made in the program as a consequence of Participant suggestions, made through the Group Leaders or directly to the Director. Happily, however, general Participant satisfaction with the program appeared to render unnecessary occasion for formalization of Participant involvement.

Although administrators of the University of Wisconsin Law School cooperated to the fullest, the heavy demands on the law building that result from that School's dynamic Summer program imposed some constraint on facilities available to the Clinic. The major deficiency concerned the rooms needed for small-group sessions. Of the six required, two were rather cramped and one overly large for the purpose. However, some trading of rooms among the groups and the good spirit generally prevailing prevented the handicap from being serious. The availability for breaks of the Student Lounge and adjoining courtyard was a most favorable feature, conducive to much interchange of views in immediate temporal context with both general and small-group sessions.

The major disappointment in locating the 1971 Clinic at Madison lay in the living unit selected. The Towers had the advantage of close proximity to the Law School, thus facilitating the taking of all luncheons together with consequent contribution of another and different opportunity for daily informal consideration of issues pertinent to the Clinic program. The luncheon menus, however, were meager in both quality and variety. Two criticisms were leveled against the living suites by many Participants and some Faculty, one their confining areas and secondly the inadequacy of the air conditioning. In the Director's judgment the first objection was not well taken in the sense that for the type of accommodations needed and at a price within the Government maximum on stipend they were the best that could be had. The very proximity of The Towers to the law building, necessitating its location in downtown Madison, meant the absence of all outdoor recreational facilities. On the affirmative side of the ledger, on the other hand, were a spacious lounge on the Lower Level that served well for evening sessions, some provision for indoor recreation, and (also on the Lower Level) rooms quite adequate for the extensive Clinic Library described in outline form in an Appendix. Experience and common sense testify to the fact that combinations of facilities necessary for the adequate staging of a Law Teaching Clinic are difficult to find, when to the physical and other local requirements is added the travel-cost factor that excludes consideration of many geographical areas of the Nation.

III. PROGRAM OPERATION (continued)

D. Evaluation

The prime objective evaluation of the 1971 Law Teaching Clinic is provided by the Participant evaluations attached as an Appendix. Ratings on the 1 to 5 scale were generally good for most segments of the program; lowest ratings tended to go to the living and dining accommodations, on which comment has been made immediately above. Appended are unsolicited letters from Participants and Faculty received since the close of the Clinic. The evident desire to be constructive in criticism is itself an indication of the Clinic's success. Although subjective evaluations are of course hazardous, the Director sensed throughout the three weeks a general satisfaction, with enthusiastic Participant reaction on numerous occasions and with several moving tributes at the social occasion terminating the Clinic.

As in 1969, the Executive Committee of the Association of American Law Schools will call a meeting this Autumn for long-term evaluation of this Association-sponsored project. The results of this session will be communicated to the Office of Education.

III. PROGRAM OPERATION (continued)

E. Relationship with OE

As in the case of the initial projection of a program for law teachers emphasizing significant problems of the teaching function, relationship with the Office in planning and staging the 1971 Law Teaching Clinic has been most satisfactory from the project's point of view. Within the limitations prescribed by statute and regulation, Officials of the Office have been cooperative and helpful at every point. The Director takes this occasion to express his sincere appreciation of the opportunity afforded him, the Clinic Faculty, the 1971 Participants, and the Association itself to present a second Law Teaching Clinic with the lead time necessary for planning what is for the profession of law teaching a project as new in conception as it is old in need. Only one criticism is offered. That concerns the maximum of $75 per week per Participant as a stipend. Inflation makes this no longer adequate to cover basic living costs of board and room in the cities appropriate for locating a Law Teaching Clinic. It is most regrettable that the Participant stipend under the Education Professions Development Act is yet another victim of inflationary trends, but of this fact there is no question. It is to be hoped that a "cost of living" increment can be added under future grants.

IV. CONCLUSION

Without question the most significant aspect of the program was the marked impact on Participants of the first week. General and small-group sessions alike brought home to them the essentiality of an understanding of the teaching-learning process as concerns both learning theories and the psychological ramifications of student-teacher interaction. The experience was intense for most Participants; one was so affected that he returned home for a week on advice of Dr. Redmount. Yet on retrospection only this one member of the total group of 58 felt that the impact was unnecessarily severe; the general reaction was that, while intense, the experience was most insightful and valuable.

While the accentuated use of films and tapes in presentation was something of a disappointment, the difficulties (already outlined) are correctable. Certainly there is no reason to abandon continued development of these audio and audio-visual media; quite the contrary. The same is to be said of the practice teaching sessions and of the video taping of them; while there were disappointments with each, avenues to improvement are clear and the potentialities must not be foregone.

The uneveness of quality during the final week, together with some unhappiness over the sequencing of topics, can be corrected by alterations that, at least negatively, have already been identified. To some extent the very success of the first two weeks in the eyes of the Participants set a difficult standard to achieve the last week. It was fully met on Wednesday and reasonably well on Thursday and Friday; another time, Monday and Tuesday would require revamping. Indeed, another year the choice of topics might well be different, with that on the minority-group student blended into the entire program rather than treated late and separately. If an able Black legal educator of the caliber of Professor Tollett could be interested, it might be wise to make him one of the Resident Faculty as suggested by a Participant.

Both oral and written statements of the great majority of Participants leave no doubt in the Director's mind that there will be not only lasting and powerful impact on them individually but also great effect on other faculty of the Schools represented as they disseminate among colleagues views and challenges drawn from their Clinic experience. There is now evidence that the initial Law Teaching Clinic has had considerable impact in both these ways; there is every reason to believe that the much improved Clinic of 1971 will have great impact.

In conclusion the Director believes it wholly justified to assert that the concept of a Law Teaching Clinic, made available as demand indicates, has now proved its value as a unique method for contributing to the strengthening of the quality of legal education throughout the law schools of the country. It merits inclusion among the projects permanently sponsored by the Association of American Law Schools.

APPENDIX A

Overview of the Clinic Program

The period of the Law Teaching Clinic, July 26 through August 13, will encompass three five-day working weeks and two weekends. The total of fifteen days of concentration on law teaching will divide as follows:

(1) The first seven days (July 26-30 and August 2-3) will be devoted to major facets of the teaching-learning process, with General Sessions featuring the Topic Leaders and with individual group sessions under the leadership of the Group Leaders. The various general presentations will include several of the Great Teacher Films produced at the University of Miami under the sponsorship of a Committee of the Association of American Law Schools; demonstrations of traditional and experimental teaching, of fundamental elements in student-teacher interaction, and of the importance of the affective (emotive), structural, operational, and other aspects of the learning process; video tapes of instructive sessions of the 1969 Clinic; and "revisits" of General Sessions featuring Faculty and Participant questioning and comment. The small-group sessions with Group Leaders will afford extensive opportunity for informal Participant appraisal and testing of the guts of the educative function within the framework of general-session coverage. Every effort is being made to provide a milieu for stimulating insight into major ways and means for designing patterns of legal education equal to the challenge before the law schools.

(2) The next three days (August 4-6) will be devoted to direct Participant experience with law teaching under conditions designed to afford guidance and critique respecting both preparation for actual or simulated classes and performance in them. The School of Law of the University of Wisconsin has tendered its full cooperation in maximizing the value to Participants of these experiences. Group Leaders will direct the planning and executing of this phase of the Program, with the assistance of a Clinic coordinator and of Wisconsin Faculty and Administration. There will be video taping, for later assessment, of as many of the teaching sessions as available equipment permits.

(3) The final five days (August 9-13) will feature consideration of six highlight topics of interest and concern to both individual law teachers and law faculties as a whole. These will be: curricular models of the Association Committee on Curriculum Study and of selected Schools; educational measurement - problems with grading and grading standards; the research role of the law teacher, individually and collectively; the service role of the law teacher and the law school in today's activistic context; the collegial relations of law teachers - with one another, with law-school and university administration, with law-reform agencies, with educational organizations, and with the organized bar. The more formal discussions of these topics in General Sessions will be led by Resource Specialists chosen for their capacity to bring insight and wisdom to their consideration. There will be opportunity with Group Leaders in group sessions for Participants to react to these presentations, to exchange among themselves their own views on the issues considered, to formulate their own models for curriculum and for collegial relationships, to practice with newer measurement techniques for grading, and to shape constructive policies for improvement of educational opportunity in law study for members of minority groups.

The two weekends will be free for local recreation, additional reading of Clinic materials, short trips, and the like. An organized activity of likely general interest will be a Saturday visit to the Ringling Bros. circus museum at Baraboo, Wisconsin.

Under a grant from the
United States Office of Education

The Association of American Law Schools
announces a

LAW TEACHING CLINIC

for

July 26 - August 13, 1971

Host Institution
The University of Wisconsin
at
Madison

Grantee Institution
The University of North Carolina
at
Chapel Hill

A Special Project under Part VE
of the
Education Professions Development Act

SPONSORSHIPS

The second Law Teaching Clinic, like the first, is a project of the Association of American Law Schools. The University of North Carolina continues as the grantee institution and fiscal agent. However, the 1971 Clinic will be located at the University of Wisconsin, with the University of Wisconsin Law School acting as host, pursuant to Association determination to rotate site to the extent consistent with adequacy of required facilities.

OBJECTIVE

Today's beginning law teacher brings to his professional task a high quality of legal capacity. With exceptions, however, he does not come as adequately equipped for the *teaching* of law. The focus of the Law Teaching Clinic is therefore on the pedagogical aspects of his function as an individual faculty member and on the broader issues facing law facilities now charged with the primary direction that legal education is to take in preparation for the profession of law. The need being national in scope, the Clinic will be open to all member Schools of the Association of American Law Schools and to other Law Schools approved by the American Bar Association.

PROGRAM

The Clinic will cover the period July 26 - August 13, inclusive, divided into three work weeks of five days each. The two intervening weekends will be free for individual reading, ad hoc group sessions, and recreational diversion. Some evenings during Monday - Friday will be scheduled for informal social functions, subject--matter seminars, viewing of audio and video tapes, added discussions with members of the Clinic Faculty, and the like.

The primary program will be structured from an analysis of the nature of the learning process; of the educational components in legal learning; of the parties to the teaching-learning operation, their roles and backgrounds; and of the institutional framework of teaching and testing methods, curricular patterns, and educational perspectives.

As thus designed, this program will be scheduled through the fifteen days as follows: First, a series of general presentations in differing formats, directed to major problems in legal education and accompanied by full opportunity for discussion in small-group sessions;

second, several days of demonstrations and practice teaching with opportunity for critique; and, third, a final week of attention to six "highlight" issues of central importance for law teachers, individually and as members of a faculty of law, using outstanding Resource Specialists, question sessions, and small-group evaluations for full ventilation.

ELIGIBILITY

Consistent with its objective, the Clinic is open to two classes of law teacher: (1) those under contract to commence the teaching of law in the Autumn of 1971; (2) those with under five years of law teaching experience. Space permitting, a few not meeting either of these criteria will be admitted on demonstration that their participation would be consistent with the Clinic's objective. Those eligible on the above bases must also, to qualify, give assurance that they can devote full time and effort to the Clinic during the three-week period, preceded by advance study of materials to be provided Participants before the opening of the Clinic.

In the selection of Participants for the Clinic, and in all aspects of Clinic administration, the Universities of North Carolina and Wisconsin, in cooperation with the Association of American Law Schools, give assurance that there will be no discrimination on grounds of color, creed, race, sex, or national origin.

FINANCES

A School assessment of $200 for each attending member of a School's faculty will be required, as in 1969, by reason of restrictions in the Federal grant that forbid use of Federal funds for some necessary expenses.

Travel and basic living expenses of Participants will be defrayed. Travel reimbursement will be based upon air coach fares in effect at the time of the Clinic. Stipends for meals and room rental will be paid weekly to the Participants, as required by the Federal grant.

Federal grant monies cannot be used for dependency allowances where, as with the Law Teaching Clinic of 1971, the program is of less than four weeks' duration. No assurances can be made ahead of the Clinic dates that unrestricted funds can be devoted to this end.

LIVING FACILITIES AND CLINIC SESSIONS

Participants and Faculty will be housed in The Towers, a suite-type, air-conditioned residence unit located within easy walking distance of the Law Building on Campus and of downtown Madison. Single Participants will be assigned two to a suite; Participants accompanied by wives or wives and one or two children may speak for an entire suite, with the understanding that only the proportionate cost for the Participant himself can be covered by Clinic funds.

All day sessions of the Clinic, Monday through Friday of each week, will be held at the Law School. Evening sessions, however, will be scheduled for The Towers.

Breakfast and Luncheon, seven days each week, will be taken at The Towers by Participants, Faculty, and families to facilitate informal contacts and discussions. Decision will be made later regarding the evening meal.

APPLICATIONS AND REGISTRATION

Forms for expression of interest in attendance by those eligible accompany this Brochure. Application forms for enrollment, for living quarters, and for Participant stipends will be mailed in January directly to those who have expressed interest and to the Deans for distribution to teaching recruits and other eligibles not in direct contact with Assistant Director Richard Smith, who will handle registration. Registration will open on February first, and continue until Clinic capacity is reached.

RECREATION

Madison, Wisconsin, is situated among four lakes, the largest of which is Lake Mendota. Opportunities for boating, fishing, sailing, and swimming abound. Recreation facilities of the University, including tennis courts and the indoor swimming pool, will be available at modest cost. The University has no golf course, but other courses are available at current fees.

The Clinic itself will host several recreational occasions, the details of which will be given during the course of the three weeks at Madison.

STAFF

Frank R. Strong, Director
Richard M. Smith, Assistant Director
Mrs. June L. Daley, Administrative Assistant
University of North Carolina School of Law

ADVISORY COMMITTEE

Richard G. Huber, Chairman
Boston College Law School

E. Clinton Bamberger, Jr., Catholic University of America School of Law

Walter Gellhorn, Columbia University School of Law

George Lefcoe, University of Southern California Law Center

Robert J. Levy, University of Minnesota Law School

Harold B. Maier, Vanderbilt University School of Law

Wex S. Malone, Louisiana State University Law School

J. Keith Mann, Stanford University School of Law

Harry B. Reese, Northwestern University School of Law

Emerson G. Spies, University of Virginia School of Law

Detlev F. Vagts, Harvard University Law School

Andrew S. Watson, M.D., University of Michigan Law School

ASSOCIATION OF AMERICAN LAW SCHOOLS

Jefferson B. Fordham, Professor of Law and Dean Emeritus,
University of Pennsylvania, President (1970)

Alfred F. Conard, Professor of Law
University of Michigan, President (1971)

Michael H. Cardozo, Professor of Law
Executive Director of the Association

FACULTY

Six Group Leaders and six Topic Leaders will be in residence the entire three weeks of the Clinic.

Group Leaders

N. William Hines, Professor of Law
University of Iowa

George Lefcoe, Professor of Law
University of Southern California

Robert J. Levy, Professor of Law
University of Minnesota

Frank I. Michelman, Professor of Law
Harvard University

Robert L. Rabin, Professor of Law
University of Wisconsin

Richard E. Speidel, Professor of Law
University of Virginia

Topic Leaders

Louis M. Brown, Irell & Manella, Los Angeles;
Adjunct Professor of Law
University of Southern California

Lawrence M. Friedman, Professor of Law
Stanford University

Harry Jones, Cardozo Professor of Jurisprudence
Columbia University

Charles D. Kelso, Professor of Law
Indiana University (Indianapolis)

Robert S. Redmount, LL.B., Ph.D.
Practicing Clinical Psychologist; member, Connecticut Bar

Andrew S. Watson, M.D., Professor of Law and Professor of Psychiatry
University of Michigan

Resource Specialists

Other able Clinic Faculty, serving as Resource Specialists, will be present for shorter periods, primarily for the "highlight" issues of the final week.

ASSOCIATION OF AMERICAN LAW SCHOOLS

law teaching clinic

FRANK R. STRONG, DIRECTOR
RICHARD M. SMITH, ASSISTANT DIRECTOR
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514
Area Code 919, 933-5106

MICHAEL H. CARDOZO
EXECUTIVE DIRECTOR
Association of American Law Schools
One DuPont Circle
Washington, D. C. 20036

ADVISORY COMMITTEE
RICHARD G. HUBER, CHAIRMAN
Boston College Law School
E. CLINTON BAMBERGER, JR.
Catholic University School of Law
WALTER GELLHORN
Columbia University School of Law
GEORGE LEFCOE
Yale University Law School
ROBERT J. LEVY
University of Minnesota Law School
HAROLD G. MAIER
Vanderbilt University School of Law
WEX S. MALONE
Louisiana State University Law School
J. KEITH MANN
Stanford University School of Law
HARRY B. REESE
Northwestern University School of Law
EMERSON G. SPIES
University of Virginia School of Law
DETLEV F. VAGTS
Harvard University Law School
ANDREW S. WATSON, M. D.
University of Michigan Law School

June 1, 1970

MEMORANDUM

To: Deans of Member Schools
From: F. R. Strong, Director
Subject: Second Law Teaching Clinic

A second LAW TEACHING CLINIC under the sponsorship of the Association of American Law Schools will be held in the summer of 1971. The second Clinic, like the first held in the summer of 1969, is made possible by a grant from the United States Office of Education. Again, a School supplement of $200 for each attending law teacher will be necessary by reason of restrictions in the Federal grant that prevent use of Federal funds primarily for Participant travel. Dates and location have not yet been precisely fixed; however, assurance can be given that the session of three weeks will fall within the period July 19 - August 13 of 1971 and that the Clinic will be located at the Member School offering the best available combination of needed living and academic facilities, geographical availability, and general attractiveness. A Report on the 1969 Clinic appeared in 1969 AALS Proceedings, Part I, Section I, pp. 118-126.

Programming and scheduling will be substantially altered from the 1969 pattern in accordance with experience in that initial venture. All sessions will be in small groups; the faculty will consist of a smaller number who will be resident for the full period; the formal workday will be somewhat shortened, as will the overall period (four weeks to three); and the emphasis of the Clinic will be on intensive consideration of selected areas with more opportunity for demonstration of method and Participant experience in practice application.

Eligibility rules have not yet been finally determined. However, the objective will continue to be that of providing the neophyte law teacher (and, if space permits, the teacher of greater experience) with an opportunity for concentrated attention to major problems in both classroom pedagogy and educational perspective under an able faculty of stimulating Group Leaders and of Topic Leaders chosen for their acknowledged expertise. Applications will be received beginning January 4, 1971, for a limited enrollment of 60 - 65. Between the Federal grant and the School supplement, travel and living expenses of those enrolled will be fully covered.

ASSOCIATION OF AMERICAN LAW SCHOOLS

Law Teaching Clinic

Expression of Law School Interest

Law School ______________________________

The undersigned registers the serious interest of the above School in having _____ of its Faculty attend the 1971 Law Teaching Clinic scheduled for July 26 to August 14 at the University of Wisconsin. It is understood that the expenses of Participants are covered but that a School assessment of $200 per participating Faculty member is necessary to defray costs that cannot be met from the Federal grant. It is further understood that the present statement is an expression of definite interest and of the School's willingness to meet the School assessment, but that it is necessarily subject to individual Faculty interest in attendance.

Dean ____________________

Frank R. Strong, Director
AALS Law Teaching Clinic
School of Law, University
of North Carolina
Chapel Hill, N. C. 27514

ASSOCIATION OF AMERICAN LAW SCHOOLS

Law Teaching Clinic

Expression of Individual Faculty Interest

Name____

Years in Law Teaching______________________________

Law School Faculty Affiliation________________________

The undersigned expresses serious interest in attending the Law Teaching Clinic, scheduled for July 26 to August 14 at the University of Wisconsin, on the terms set forth in the Brochure. However, it is understood that expression of interest at this time signifies only a tentative decision and is not to be taken as a final commitment to attend.

____

Richard M. Smith, Ass't Director
AALS Law Teaching Clinic
School of Law, University
of North Carolina
Chapel Hill, N.C. 27514

ASSOCIATION OF AMERICAN LAW SCHOOLS

law teaching clinic

FRANK R. STRONG, DIRECTOR
RICHARD M. SMITH, ASSISTANT DIRECTOR
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514
Area Code 919, 933-5106

MICHAEL H. CARDOZO
EXECUTIVE DIRECTOR
Association of American Law Schools
One DuPont Circle
Washington, D. C. 20036

ADVISORY COMMITTEE
RICHARD G. HUBER, CHAIRMAN
Boston College Law School
E. CLINTON BAMBERGER, JR.
Catholic University School of Law
WALTER GELLHORN
Columbia University School of Law
GEORGE LEFCOE
Yale University Law School
ROBERT J. LEVY
University of Minnesota Law School
HAROLD G. MAIER
Vanderbilt University School of Law
WEX S. MALONE
Louisiana State University Law School
J. KEITH MANN
Stanford University School of Law
HARRY B. REESE
Northwestern University School of Law
EMERSON G. SPIES
University of Virginia School of Law
DETLEV F. VAGTS
Harvard University Law School
ANDREW S. WATSON, M. D.
University of Michigan Law School

The undersigned invite your attention, as a beginning law teacher, to the Law Teaching Clinic to be held at Madison, Wisconsin, this coming summer. The enclosed brochure provides general information regarding this project of the Association of American Law Schools. To afford a basic conception of the matters to which the three weeks will be devoted, there is also enclosed an Overview of the Clinic Program.

We are confident that the 1971 Law Teaching Clinic will be of great value to those anticipating their first year of law teaching. An excellent Faculty has been assembled; and there has been adequate time in which to plan a program that will enhance understanding of the dynamics and subtleties of the learning process, afford direct experience in classroom performance under conditions of constructive evaluation, and highlight some of the major problems facing today's law teachers individually and collectively. The "new law student" requires of the law teacher greater appreciation of the nature of student-teacher interaction, of the altered role of the law teacher in contexts in which authority is under challenge, and of teaching approaches and methods adequate to meet the press for curricular revisions of traditional law course patterns. Similarly, changing conceptions of the objectives of legal education and of the legal profession make new demands upon law faculties as a whole for major redirection of legal education. There is need for opportunity to concentrate on avenues for the improvement of law teaching as the medium for effective education of law students in broad perspective as well as in technical competency.

We suggest you give serious consideration to attendance at the Clinic. We believe your Dean will approve and guarantee the School assessment involved. Early action on your part is urged in view of the marked interest already shown by other eligibles. Official registration, now under way, will continue until all spaces are taken. Write or call the Director or Assistant Director; address and phone number appear on the letterhead.

Sincerely yours,

Richard G. Huber
Chairman, Advisory Committee

Frank R. Strong
Director

ENCLOSURE
FRS:jld

ASSOCIATION OF AMERICAN LAW SCHOOLS

law teaching clinic

FRANK R. STRONG, DIRECTOR
RICHARD M. SMITH, ASSISTANT DIRECTOR
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514
Area Code 919, 933-5106

MICHAEL H. CARDOZO
EXECUTIVE DIRECTOR
Association of American Law Schools
One DuPont Circle
Washington, D. C. 20036

ADVISORY COMMITTEE
RICHARD G. HUBER, CHAIRMAN
Boston College Law School
E. CLINTON BAMBERGER, JR.
Catholic University School of Law
WALTER GELLHORN
Columbia University School of Law
GEORGE LEFCOE
Yale University Law School
ROBERT J. LEVY
University of Minnesota Law School
HAROLD G. MAIER
Vanderbilt University School of Law
WEX S. MALONE
Louisiana State University Law School
J. KEITH MANN
Stanford University School of Law
HARRY B. REESE
Northwestern University School of Law
EMERSON G. SPIES
University of Virginia School of Law
DETLEV F. VAGTS
Harvard University Law School
ANDREW S. WATSON, M. D.
University of Michigan Law School

June 30, 1971

Dear Participant:

This letter provides additional, more detailed information about housing, food, stipend, travel reimbursement and other matters for the 1971 Law Teaching Clinic. If you should have any additional questions feel free to contact me in Chapel Hill prior to July 10, 1971, or at the University of Wisconsin Law School after July 21.

The Clinic, of course, formally opens on July 26, 1971, at 9:00 a.m. Therefore, you should plan for arrival in Madison sometime during Sunday, July 25, 1971. The living unit for all Participants, Faculty, and families is The Towers. The entrance is at 502 North Frances Street. You may check in at any time after 2:00 p.m. A buffet meal will be served at The Towers from 6:00 until 8:30 that evening as a convenience for arrivals.

Living Accommodations

A. Room - The basic unit in The Towers is a two-bedroom suite with a bath, closets, and a small adjoining room between. Each bedroom has two single beds, as the basic furnishing. The enclosed sketch shows the floor plan. The rates at The Towers are based upon the number of rooms devoted to the exclusive use of the particular Participant, and are not based upon the number of persons occupying those rooms. The suites are rented with four different plans.

First, the Participant can have private use of one of the bedrooms, and share the use of the bath and small adjoining room with another Participant. The cost for this room arrangement will be $40.00 per Participant per week.

Second, the Participant can have private use of one bedroom, the bath, and the small adjoining room. The other bedroom would be closed off and not occupied. The cost for this room arrangement will be $55.00 per week.

Third, the Participant can have exclusive use of an entire suite. The cost for that will be $70.00 per week for the rooms.

Fourth, it would be possible for four Participants to occupy a single suite at about $20.00 each per week. Under no circumstance would this plan be required. However, it will be available if one or more groups of four Participants should desire this arrangement.

The designation of arrangement will be at the option of the Participant, to be specified when checking in on July 25, 1971.

B. Meals - Breakfast and lunch will be served at The Towers. The cost will be $1.00 for breakfast ($.50 for children under 12) and $1.50 for lunch ($.75 for children under 12). No evening meal will be served at The Towers, but adequate other facilities in varying price ranges are available within easy walking distance of The Towers. Each Participant will be billed for lunch seven days per week (5 days for the final week), and for breakfast, if breakfast is desired. Meal tickets for accompanying wives and children will be available on a weekly basis only, and may be purchased at the option of the Participant. Meal tickets for the first week should be purchased upon checking in.

Illustrative of room and meal costs are the following:

For a single Participant, assuming semi-private bath arrangement (plan 1 above), $57.50 per week, plus the cost of seven evening meals.

For a Participant accompanied by spouse, assuming private bath and single-bedroom occupancy and that the accompanying spouse takes breakfast and lunch at The Towers, $90.00 per week, plus the cost of evening meals.

For a Participant accompanied by a spouse and two children under 12 years of age, assuming use of an entire suite and that spouse and children eat breakfast and lunch at The Towers, $122.50 per week plus the cost of evening meals.

Reimbursement

A. Stipends - Each Participant will receive a check in the amount of $75.00 at the beginning of each of the three weeks. This is the maximum stipend provided by the Federal grant. In addition, from non-restricted funds, each Participant will receive a single check in the amount of $25.00 to help defray expenses. This check will be delivered during the final week of the Clinic.

B. Travel - Travel expenses will be reimbursed on the basis of the tourist-class air fare from and to the airport nearest your points of departure and return. As complicated as air fare tariffs have become it is probable that there are several fares that could be classified as "tourist" fares. However, our budget is set up on the basis of a through or "joint" fare. We have been informed that all airline companies have "joint" fare agreements with one or more airlines that serve Madison. If that is true, a joint fare would theoretically always be available. However, if you fly to Madison and find that the only joint fare available would provide an unreasonably inconvenient schedule, we will reimburse on the basis of actual cost of your tourist class fare. The recent and unanticipated increases in air fares may make impossible an allowance as such for ground transportation to and from airports. In Madison the limousine fare is $1.25. The check for travel expense reimbursement will be delivered during the final week.

Social Events

The Clinic's budget will make possible a limited social program. Now scheduled are:

1. On the first Wednesday, an evening get-together to sample a leading Milwaukee product.

2. On the first Saturday, July 31, a visit to the Circus World Museum, approximately 40 miles from Madison, for all interested. (For the railroad buffs, the Mid-Continent Railroad Museum is nearby). Luncheon will not be served at The Towers that day; in its place, The Towers will serve a buffet dinner on that Saturday only from 6:00 to 8:00 p.m.

3. On Friday, the second week, August 6, an evening party with accoutrements.

4. On the final day, August 13, a special late afternoon - early evening occasion.

At the present time, the Clinic is at capacity, with 61 Participants. Advance indications are that about 29 spouses will accompany Participants, as will approximately 36 children of varying ages. In addition there will be 15 permanent faculty and staff, with some spouses and additional children, and 13 other faculty who will be present for one or more days each.

Facilities at The Towers are very good. As with nearly all Universities, parking is a problem. However, the Law School is only about four blocks from The Towers, making walking possible from one to the other, and free parking is available a short bus ride away. There is also metered parking available at city-owned ramps only blocks from The Towers, but the cost and inconvenience would be prohibitive for long-term parking.

In conclusion let me wish you a good trip to Madison, and I shall look forward to meeting you on July 25, 1971.

Sincerely,

Richard M. Smith

Richard M. Smith
Assistant Director

RMS:jld

APPENDIX B

The Association of American Law Schools

PROGRAM

LAW TEACHING CLINIC

July 26 - August 13, 1971

Host Institution
The University of Wisconsin
at
Madison

Grantee Institution
The University of North Carolina
at
Chapel Hill

A Special Project under Part VE
of the
Education Professions Development Act
United States Office of Education

25

Monday, July 26

9:00 - 9:45	Opening General Session Welcome and acknowledgments by Dean Richard G. Huber, Chairman of the Advisory Committee of the Law Teaching Clinic. Remarks by John C. Weaver, President of the University of Wisconsin. Remarks by J. Dickson Phillips, Dean of the University of North Carolina School of Law. Introduction of the Clinic's Resident Faculty and reference to the Resource Specialists to appear later. Frank R. Strong, Director of the Clinic. Room assignments for General and Small-Group Sessions, general arrangements regarding building use, and "paymaster" announcements. Richard M. Smith, Assistant Director.
9:45 - 10:15	Morning break
10:15 - 12:00	Small-Group Sessions Groups 1 through 6 meeting separately for familiarization of Participants inter se and with the Group Leader; for beginning Group consideration of the qualities necessary for effective teaching; for Participant expression of desired experiences at the Clinic; and for Participant evaluations of their own formal legal education.
12:00 - 1:30	Luncheon period Each Group to be seated with its Group Leader and with one of the Topic Leaders. After this initial Luncheon, seating will be by ad hoc groupings.
1:30 - 2:15	General Session "Some Further Thoughts on Learning and Teaching." Further development by Dr. Robert S. Redmount of the psychological ramifications of the teaching experience and the learning experience.
2:15 - 2:45	Discussion of Dr. Redmount's conceptualization of the process of legal education, which projects the Clinic program for the first two weeks.
2:45 - 3:15	General Session (continued) "Highlight Issues in Legal Education." Overview by Professor Robert J. Levy of the current issues in legal education selected for spotlighting during the third and final week of the Clinic.
3:15 - 3:45	Afternoon break
3:45 -	Small-Group Sessions Continuation of morning Group discussions and consideration of the Redmount analysis.

Tuesday, July 27

9:00 - 10:00	General Session "Dialogue on Contracts." Professor Harry W. Jones in one of the Great Teacher Films produced for the Association of American Law Schools under the general direction of Professor Charles D. Kelso.
10:00 - 10:30	Commentary by Professor Jones on his teaching objectives and methods as revealed in the teaching film.
10:30 - 11:00	Morning break
11:00 - 12:00	General Session (continued) Commentary by Dr. Andrew S. Watson on the teaching of Professor Jones, with reactions on the part of the latter.
12:00 - 1:30	Luncheon period
1:30 - 2:30	General Session "Psychological Dynamics of Legal Education." (Reel 1) Dr. Watson, in another of the Great Teacher Films, illustrating the importance of a full comprehension of emotional relationships in the learning context. Commentary by other Faculty and by Participants.
2:30 - 3:00	Afternoon break
3:00 -	Small-Group Sessions Groups 1 through 6, meeting separately for evaluation of the case method in terms of affective and operational, as well as cognitive, learning. Professor Jones, Dr. Watson and other Topic Leaders to be "on call" by Groups desiring their participation in Group discussion. Available for comparison will be Adjunct Professor Brown's "Dialogue on Two Tax Cases" in which he illustrates a segment of tax teaching by the case and alternative methods.

Wednesday, July 28

9:00 - 11:00	General Session Demonstration by Dr. Watson of the significance of the emotional factor in student-teacher, attorney-client, and other human interrelationships.
11:00 - 12:00	Informal questioning of Dr. Watson by Participants.
12:00 - 1:30	Luncheon period
1:30 - 3:00	Small-Group Sessions Groups 1 through 6, in separate sessions, focusing on fuller understanding of the psychological factors experienced by student and teacher in the teaching-learning interaction.
3:00 - 3:30	Afternoon break
3:30 - 4:00	General Session "Psychological Dynamics of Legal Education." (Reel 2) Dr. Watson in further emphasis by film on the essentiality of understanding the affective element in learning and practicing law.
4:00 -	General Session Dr. Watson "revisited." Lead by Group Leaders Levy and Speidel.
7:30 -	Informal social occasion for Participants, Faculty, and spouses. The Towers.

Thursday, July 29

9:00 - 10:00	General Session Videotape demonstration by Professor Charles D. Kelso of experimental teaching of Contracts. This tape has been specially prepared for the Clinic, under Professor Kelso's supervision, from videotapes of class teaching consciously employing tension-inducing, tension-minimizing, and neutral posture.
10:00 - 10:30	Morning break
10:30 - 12:00	General Session (continued) Commentary on the videotape by Professor Kelso, leading into discussion of further experimentation in programming for instruction via problem-method patterns, frames for manual or computerized self-teaching, etc. Faculty and Participant comment and questions.
12:00 - 1:30	Luncheon period
1:30 - 2:30	General Session "The Problem Method in Commercial Law." A Great Teacher Film in which Professor Soia Mentschikoff of the University of Chicago Law School demonstrates her use of the problem method for upper class instruction.
2:30 - 3:00	Afternoon break
3:00 -	Small-Group Sessions Groups 1 through 6, meeting separately for consideration of the teaching demonstrations by Professors Kelso and Mentschikoff, and of the former's morning commentary. Further demonstrations will be available on audio tapes, and materials on the problem method can be found in the Clinic Library and will be included in demonstration sets prepared for Clinic distribution by Adjunct Professor Brown.

Friday, July 30

9:00 - 10:00	General Session "Instruction in Preventive Law." Adjunct Professor Louis M. Brown in a general exposition of the merits of the "preventive law" approach as against traditional study of cases for effective instruction in the applicational and transactional components of legal learning.
10:00 - 10:30	Morning break
10:30 - 12:00	General Session (continued) Demonstrations, with films and tapes, of different methods for the teaching of preventive law. Adjunct Professor Brown.
12:00 - 1:30	Luncheon period
1:30 - 2:30	General Session "Clinical Legal Education." Comparison by Adjunct Professor Brown of clinical methods of instruction, with analysis of the relative merits and weaknesses of live versus simulated practice.
2:30 - 3:00	Afternoon break
3:00 -	Small-Group Sessions Groups 1 through 6, separately debating the pedagogical issues raised by Adjunct Professor Brown. Audio and video tapes will be available to the Groups if desired.

25E

Monday, August 2

9:00 - 10:00	General Session "Placing Law in Meaningful Social Context" Professor Lawrence M. Friedman on the essentiality of the functional component in legal education - the functions of law as procedurally corrective, as institutionally constructive, and as policy oriented toward social change.
10:00 - 10:30	Morning break
10:30 - 11:30	General Session (continued) Professor Friedman and Dr. Jack Ladinsky, Department of Sociology, University of Wisconsin, demonstrating how legal topics can be infused with behavioral science perspective.
11:30 - 12:00	General Session (continued) Commentary by Professor Robert L. Rabin on infusion in law teaching of perspectives from Economics and Political Science.
12:00 - 1:30	Luncheon period
1:30 - 3:00	Small-Group Sessions Groups 1 through 6 in separate discussions of problems involved in "integrating" law and the social sciences and in providing instruction in quantitative methods for use in legal inquiry.
3:00 - 3:30	Afternoon break
3:30 -	Small-Group Sessions (continued) Familiarization with and evaluation of recent empiric studies illustrative of the employment of social science behavioral science methodology. Dr. Ladinsky, Professor Friedman, and other Faculty to be available to the Groups if desired.

25F

Tuesday, August 3

9:00 - 10:20	General Session "The 'Values' Component in Legal Learning." Exchange of viewpoints on teacher contributions to the preservation and nurture of student idealism and service orientation. Professors Jones and Levy, Drs. Redmount and Watson. Adjunct Professor Brown, presiding.
10:20 - 10:50	Morning break
10:50 - 12:00	General Session (continued) Video tape of Professor McDougal's presentation at the 1969 Clinic of the essential features of the Lasswell-McDougal construct of Law, Science and Policy, with short introduction to the tape by Professor Speidel.
12:00 - 1:30	Luncheon period
1:30 -	Participant preparation for Wednesday, as programmed by the individual Group Leaders
7:30 - 9:00	Debate between Professors Lefcoe and McDougal on the Lasswell-McDougal construct for legal education. Video tape from the 1969 Clinic. The Towers.

25G

Wednesday, August 4

Morning
and
Afternoon

Practice Teaching: Preparation.

To be included during morning and afternoon, in whatever order the Group Leaders determine, are the following:

(1) Submission by each Participant of full class outline and notes for a teaching period. Subject matter to be determined between Group Leader and Participants.

(2) Careful Group appraisal of the prepared teaching plans and detail.

(3) Attendance at regular Wisconsin classes as arranged through the Clinic Coordinator in conference with Wisconsin Faculty and Administration.

(4) In anticipation of practice teaching experience on Thursday and Friday, selection by lot of those Participants to teach Thursday or Friday the types of classes outlined under Thursday, August 5.

Clinic Coordinator for Wednesday, Thursday and Friday: Dean Huber.

Thursday, August 5

Morning and Afternoon

Practice Teaching: Experience.

A. Practice teaching opportunities available through the cooperation of the University of Wisconsin Law School:

(1) Regular Wisconsin summer classes scheduled for Thursday or Friday, by permission of the Professor.

(2) Make-up classes arranged by Wisconsin summer Faculty, again with the cooperation of the Professor.

(3) Extra classes in scheduled summer courses, as volunteered by Wisconsin summer students (no more than one class to a student) and with topics to be determined by the course Professors, the Group Leaders, and the Clinic Coordinator.

B. Further practice teaching arrangements:

(4) Simulated classes of volunteer undergraduates at Wisconsin.

(5) Simulated classes consisting of Participants.

Insofar as possible, practice teaching will be videotaped for Friday critique. Assistant Director Smith of the Clinic will handle details in cooperation with Associate Dean Melli.

7:30 - 9:00

"The Law Teacher's Wife."
Informal occasion at The Towers in which attention is focused on the life of the teacher's wife. Hopefully the wives, under the persuasive powers of Professor Levy and Dean Huber, will develop a skit, commentary, or other depiction.

25 I

Friday, August 6

Morning and Afternoon	Practice Teaching: Experience and Critique (1) Continuation of practice teaching experience under Thursday's pattern. (2) Critique sessions as scheduled by Group Leaders and Clinic Coordinator. Video tapes of "practice classes" to be available through arrangements with Assistant Director Smith. Topic Leaders to join with Group Leaders in critiques. (3) Further attendance at regular Wisconsin summer classes, as (1) and (2) permit, through arrangements made by the Clinic Coordinator.
8:00 -	Cocktail party at The Towers, in appreciation of cooperation of the summer students and Faculty of the University of Wisconsin.

Monday, August 9

9:00 - 10:00	General Session "Curricular Models" Commentary on the Report of the AALS Curriculum Study Project by Professor George Lefcoe, member of the Study Committee, Dr. Robert Redmount, and Professor Strong.
10:00 - 10:30	Morning break
10:30 - 12:00	Semi-General Sessions Curricular innovations in effect at three representative Schools: Iowa, South Carolina, and Stanford. Professor N. William Hines will outline and respond to questions concerning the Iowa program; Professors Ralph McCullough and Webster Myers will be available for discussion of the new South Carolina pattern; and Professor Friedman will talk with those interested in the Stanford revisions.
12:00 - 1:30	Luncheon period
1:30 - 2:45	Small-Group Sessions Groups 1 through 6 meeting separately for consideration of current approaches to curricular reform.
2:45 - 3:15	Afternoon break
3:15 -	Small-Group Sessions (continued) Each Group may wish to constitute itself as the Curriculum Committee of the "ideal" law school, charged with formulation of recommendations for a model curriculum.
7:00 - 9:00	Course Seminars (at The Towers) Commercial Law - Professors Smith and Speidel Jurisprudence - Professors Brown, Jones, Myers Property - Professors Hines, Huber, Lefcoe, Michelman Torts - Professors McCullough and Rabin

25k

Tuesday, August 10

9:00 - 10:00	General Session "Essay and Objective Examination Questions." Video tape of Professor Ball's discussion of objective questions at the 1969 Clinic, with direct commentary by him.
10:00 - 10:30	General Session (continued) Tips on the drafting of objective questions. Professor Ball.
10:30 - 11:00	Morning break
11:00 - 12:00	General Session (continued) "Grading Standards." Discussion by Professor Ball of scoring methods, mathematics for rank ordering of performance, determination of cutting points for assignment of letter or numerical grades, grade standardization, etc. Illustrative materials to be provided.
12:00 - 1:30	Luncheon period
1:30 - 3:30	Small-Group Sessions Groups 1 through 6 for individual practice in "grading" and in drafting of objectives. Exercises will be provided.
3:30 - 4:00	Afternoon break
4:00 - 5:00	General Session Exchange of views on the merits of currently debated departures from traditional grade reporting. Professors Ball, Cardozo, Friedman and Michelman, Dr. Redmount. Moderator: Professor Levy.

Wednesday, August 11

9:00 - 10:15	General Session "The Research Role of the Law Teacher." Presentations by Professors Willard Hurst and Maurice Rosenberg. Professor Jones, presiding.
10:15 - 10:45	Morning break
10:45 - 12:00	General Session (continued) Discussion by Professor Jones; comments by other Faculty; and opportunity for Participant questioning.
12:00 - 1:30	Luncheon period
1:30 - 3:00	Small-Group Sessions Groups 1 through 6 meeting separately for consideration of the day's topic. Groups may wish to invite Professors Hurst, Jones and Rosenberg to join them for portions of the period. Also available will be other Clinic Faculty and (hopefully) members of the Wisconsin regular and visiting faculties.
3:00 - 3:30	Afternoon break
3:30 -	Small-Group Sessions (continued) Specific attention to practical problems for law teachers in shifting from the traditional base of research in law to research about law. Introduction to the Council on Law-Related Studies; illustrations of recent empiric research.
7:00 - 9:00	Course Seminars (at The Towers) Constitutional Law - Professor Strong and others Contracts - Professors Jones, Kelso, Speidel Evidence - Professor Ball and Chancellor Pye Social Legislation - Professors Friedman and Levy, Dr. Watson

N.B. Throughout the day, Mead Data Central, Inc., will demonstrate the computerized retrieval system, known as OBAR, now available in Ohio for all decisions of that jurisdiction.

25m

Thursday, August 12

9:00 - 10:15	General Session "The Service Role of the Law Teacher." Questioning by Dr. Watson of Professors Brown, Cardozo, Jones, Lefcoe, and Pye.
10:15 - 10:45	Morning break
10:45 - noon	Small-Group Sessions Groups 1 through 6 in separate sessions for discussions of the teaching "moonlighter," the teacher-practitioner, leave-of-absence policy for service roles, policy on service commitments during full-time teaching appointments, etc.
12:00 - 1:30	Luncheon period
1:30 - 3:15	General Session "Collegial and Professional Relations of Law Teachers." Exchange of views among Chancellor Pye and Professors Cardozo, Hines and Michelman. Moderator: Dean Huber.
3:15 - 3:45	Afternoon break
3:45 -	Small-Group Sessions Groups 1 through 6 for discussion of the afternoon topics. Topic Leaders and Resource Specialists to be available to the Groups on invitation.
7:00 - 8:30	Informal session at The Towers affording Participants an opportunity to quiz Deans and former Deans on internal administrative policy of law schools. Deans Huber, Kimball, and Neal, Chancellor Pye, Professor Tollett.

25N

Friday, August 13

9:00 - 10:15	General Session "Minority Group Law Students." An interchange of viewpoints on policy issues with respect to law students of minority groups: CLEO, admissions, financial assistance, tutorial support, grading standards, etc. Discussants: Dean Phil C. Neal, Professor Kenneth S. Tollett, Chancellor A. Kenneth Pye, Professor W. Garrett Flickinger. Moderator: Professor Michael H. Cardozo.
10:15 - 10:45	Morning break
10:45 - 12:00	General Session (continued) Continuation of panel discussion, with special attention to the views of Professor Tollett. Questioning of discussants by Participants, to extent time permits.
12:00 - 1:30	Luncheon period
1:30 - 3:15	Small-Group Sessions Groups 1 through 6 meeting separately for consideration of the day's topic.
3:15 - 3:45	Afternoon break
3:45 -	Small-Group Sessions (continued) The individual Groups may wish to double up for an exchange of views, or to invite in the morning discussants and other Faculty for further discussion of viewpoints.
6:00 -	Farewell occasion for Participants, Faculty, and families.

25¢

PRACTICE TEACHING

SCHEDULE - AUGUST 4 - 6

This schedule is final at the moment, but is, of course, subject to adjustments and changes. Group leaders will inform you of meeting times not listed here, and of modifications.

Wednesday, August 4th

Room B-25	9:00 - 10:15	Hines and Levy	TV
	10:15 - 11:15	Michelman	TV
	1:30 - 2:45	Hines and Levy	TV
Room 225	2:00 - 3:00	Michelman	TV
Room 157	1:30 -	Rabin	
Room 136	2:00 - 4:00	Speidel	
Faculty Lounge	1:30 -	Lefcoe	
	2:30 -	Lefcoe	

Thursday, August 5th

Room B-25	8:30 - 9:30	Lefcoe	TV
	1:30 - 2:30	Lefcoe	TV
	3:00 - 4:00	Speidel	TV
Room 225	1:30 - 2:45	Hines and Levy	TV
Room 250	10:30 - 11:45	Levy - Redlich Class	
Room 132	10:30 -	Michelman	
Room 260	2:00 - 3:45	Michelman - Shapiro Class	
Faculty Lounge	9:30 -	Lefcoe	
	2:30 -	Lefcoe	

Towers - Lower Level - 4:30 - 6:00, Women Law Teachers and Students-Conference with Dr. Watson. All invited. Refreshments.

Friday, August 6th

Room B-25	9:00 - 10:30	Hines and Levy	TV
	11:00 - 12:00	Levy and Lefcoe	TV
Room 225	9:30 - 10:30	Michelman	TV
	11:00 - 12:00	Speidel	TV
	1:00 - 2:00	Michelman	TV
Faculty Lounge	9:30 -	Lefcoe	

Friday evening - 6:00 p.m. - Party at Foster's for Groups IV, V and VI

Sunday evening - 8:00 p.m. - Cocktail party for participants, faculty, and Wisconsin faculty and students that participated in practice teaching.

APPENDIX C

1971 LAW TEACHING CLINIC

PARTICIPANTS

Walker J. Blakey
University of North Carolina School of Law
Chapel Hill, North Carolina 27514

George Bunn
University of Wisconsin Law School
Madison, Wisconsin 53706

Vincent P. Cardi
West Virginia University College of Law
Morgantown, West Virginia 26506

Miss Beverly M. Carl
Southern Methodist University
School of Law
Dallas, Texas 75222

Gerald A. Cavanaugh, Jr.
Loyola University School of Law
1440 West Ninth Street
Los Angeles, California 90015

William L. Crowe
Loyola University School of Law
6363 St. Charles Avenue
New Orleans, Louisiana 70118

Earl M. Curry, Jr.
University of Akron College of Law
302 East Buchtel Avenue
Akron, Ohio 44304

J. Hadley Edgar, Jr.
Texas Tech University School of Law
Lubbock, Texas 79409

Fred D. Fagg, III
Lewis and Clark College
Northwestern School of Law
Portland, Oregon 97219

Stephen R. Feldman
Harvard University Law School
Cambridge, Massachusetts 02138

Mrs. Elyce Z. Ferster
George Washington University
National Law Center
Washington, D. C. 20006

Alan D. Freeman
University of Minnesota Law School
Minneapolis, Minnesota 55455

Gerald M. Gallivan
University of Wyoming College of Law
Laramie, Wyoming 82070

Lawrence C. George
Florida State University College of Law
Tallahassee, Florida 32306

Wesley Gilmer, Jr.
University of Cincinnati College of Law
Cincinnati, Ohio 45221

John P. Golbert
Southwestern University School of Law
1121 South Hill Street
Los Angeles, California 90015

John D. Gregory
Hofstra University School of Law
Hempstead, Long Island, New York 11550

Charles R. Haworth
Washington University School of Law
Lindell & Skinker Blvds.
St. Louis, Missouri 63130

David R. Hood
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202

D. Brock Hornby
University of Virginia School of Law
Charlottesville, Virginia 22901

Martin J. Huelsmann
Salmon P. Chase College of Law
1105 Elm Street
Cincinnati, Ohio 45210

Miss Joyce A. Hughes
University of Minnesota Law School
Minneapolis, Minnesota 55455

Jerome O. Hughey
Lewis and Clark College
Northwestern School of Law
Portland, Oregon 97219

Wilson S. Hurd
University of Detroit School of Law
651 East Jefferson Avenue
Detroit, Michigan 48226

John F. X. Irving
Seton Hall University School of Law
40 Clinton Street
Newark, New Jersey 07102

Paul M. Kane
Boston College Law School
St. Thomas More Drive
Brighton, Massachusetts 02135

Sam D. Knowlton
Florida State University College of Law
Tallahassee, Florida 32306

Richard Diebold Lee
University of California School of Law
Davis, California 95616

Thomas A. Lockyear
Loyola University School of Law
41 East Pearson Street
Chicago, Illinois 60611

William J. McNichols
University of Oklahoma College of Law
Norman, Oklahoma 73069

Robert L. Mennell
Southwestern University School of Law
1121 South Hill Street
Los Angeles, California 90015

Fredric R. Merrill
University of Oregon School of Law
Eugene, Oregon 97403

Mrs. Lizabeth A. Moody
Cleveland State University
Cleveland-Marshall College of Law
1240 Ontario Street
Cleveland, Ohio 44113

Michael J. Moorhead
Howard University School of Law
Washington, D. C. 20001

Ray E. Moses
South Texas College of Law
1220 Polk
Houston, Texas 77002

Winston P. Nagan
Valparaiso University School of Law
Valparaiso, Indiana 46383

Stuart S. Nagel
Department of Political Science
University of Illinois
Urbana, Illinois 61801

Anthony J. Pagano
Golden Gate College School of Law
536 Mission Street
San Francisco, California 94105

Theodore Parnall
University of New Mexico School of Law
1117 Stanford Drive, N. E.
Albuquerque, New Mexico 87106

Donald B. Pedersen
William Mitchell College of Law
2100 Summit Avenue
St. Paul, Minnesota 55105

Thomas R. Puklin
Loyola University School of Law
6363 St. Charles Avenue
New Orleans, Louisiana 70118

David L. Ryan
Washburn University School of Law
Topeka, Kansas 66621

Frederick R. Schneider
Salmon P. Chase College of Law
1105 Elm Street
Cincinnati, Ohio 45210

John A. Sebert, Jr.
University of Minnesota Law School
Minneapolis, Minnesota 55455

Ira B. Shepard
University of Georgia School of Law
Athens, Georgia 30601

Peter N. Simon
University of Colorado School of Law
Boulder, Colorado 80302

Robert G. Spector
Loyola University School of Law
41 East Pearson Street
Chicago, Illinois 60611

David E. Sullivan
Texas Tech University School of Law
Lubbock, Texas 79409

Michael J. Swygert
Valparaiso University School of Law
Valparaiso, Indiana 46383

William Louis Tabac
Cleveland State University
Cleveland-Marshall College of Law
1240 Ontario Street
Cleveland, Ohio 44113

Walter J. Taggart
Villanova University School of Law
Villanova, Pennsylvania 19085

William T. Toal
University of South Carolina School of Law
1515 Green Street
Columbia, South Carolina 29208

James W. Torke
Indiana University Indianapolis Law School
735 West New York Street
Indianapolis, Indiana 46202

Gerald F. Uelmen
Loyola University School of Law
1440 West Ninth Street
Los Angeles, California 90015

Dominick R. Vetri
University of Oregon School of Law
Eugene, Oregon 97403

Thomas M. Ward
University of South Carolina School of Law
1515 Green Street
Columbia, South Carolina 29208

J. Joel Woodey
University of Maryland School of Law
500 West Baltimore Street
Baltimore, Maryland 21201

Michael J. Zimmer
University of South Carolina School of Law
1515 Green Street
Columbia, South Carolina 29208

APPENDIX D

1971 LAW TEACHING CLINIC

ADMINISTRATION

Professor Frank R. Strong, Director
University of North Carolina School of Law
Chapel Hill, North Carolina 27514

Professor Richard M. Smith, Assistant Director
University of North Carolina School of Law
Chapel Hill, North Carolina 27514

Dean Richard G. Huber, Chairman Advisory Committee, and Coordinator, Practice Teaching
Boston College Law School
Brighton, Massachusetts 02135

Mrs. June L. Daley, Administrative Assistant
University of North Carolina School of Law
Chapel Hill, North Carolina 27514

Mrs. Susan Murphy, Receptionist-Secretary
University of Wisconsin Law School
Madison, Wisconsin 53706

RESIDENT FACULTY

GROUP LEADERS

Professor N. William Hines
University of Iowa College of Law
Iowa City, Iowa 52240

Professor George Lefcoe
University of Southern California Law Center
Los Angeles, California 90007

Professor Robert J. Levy
University of Minnesota Law School
Minneapolis, Minnesota 55455

Professor Frank I. Michelman
Harvard Law School
Cambridge, Massachusetts 02138

Professor Robert L. Rabin
Stanford University School of Law
Stanford, California 94305

Professor Richard E. Speidel
University of Virginia School of Law
Charlottesville, Virginia 22901

RESIDENT FACULTY (Continued)

TOPIC LEADERS

Adjunct Professor Louis M. Brown
University of Southern California Law Center
Los Angeles, California 90007

Professor Lawrence M. Friedman
Stanford University Law School
Stanford, California 94305

Professor Harry W. Jones
R.F.D. #1, Box 142
Kent, Connecticut 06757

Professor Charles D. Kelso
Indiana University, Indianapolis Law School
Indianapolis, Indiana 46202

Robert S. Redmount, Ph.D.
60 Connolly Parkway
Hamden, Connecticut 06514

Andrew S. Watson, M.D.
Department of Psychiatry
University of Michigan Medical Center
Ann Arbor, Michigan 48104

RESOURCE SPECIALISTS

Professor Vaughn C. Ball
University of Southern California Law Center
Los Angeles, California 90007

Professor Robert L. Bard
University of Connecticut School of Law
West Hartford, Connecticut 06117

Michael H. Cardozo, Executive Director
The Association of American Law Schools
Washington, D. C. 20036

Professor W. Garrett Flickinger
University of Kentucky College of Law
Lexington, Kentucky 40506

John P. Frank, Esq.
Lewis & Roca
Phoenix, Arizona 85003

RESOURCE SPECIALISTS (Continued)

Professor Willard Hurst
University of Wisconsin Law School
Madison, Wisconsin 53706

Dean Spencer L. Kimball
University of Wisconsin Law School
Madison, Wisconsin 53706

Professor Lewis S. Kurlantzick
University of Connecticut School of Law
West Hartford, Connecticut 06117

Dr. Jack Ladinsky
Department of Sociology
University of Wisconsin
Madison, Wisconsin 53706

Professor Webster Myers, Jr.
Director of Research and Development
University of South Carolina School of Law
Columbia, South Carolina 29208

Dean Phil C. Neal
University of Chicago Law School
Chicago, Illinois 60637

Dr. A. Kenneth Pye, Chancellor
Duke University
Durham, North Carolina 27706

Professor Maurice Rosenberg
Columbia University School of Law
New York, New York 10027

Professor Kenneth S. Tollett
Center for Study of Democratic Institutions
Santa Barbara, California 93103

Mr. Peter Vann
Mead Data Central, Inc.
Dayton, Ohio 45432

Professor Douglas J. Whaley
Indiana University, Indianapolis Law School
Indianapolis, Indiana 46202

APPENDIX E

(Revised List)

PARTICIPANT and FACULTY WIVES

Bunn, Fralu
Cardi, Jane
Edgar, Helen
Feldman, Sheryl
Freeman, Iris
Friedman, Leah
Gallivan, Moira Ann
George, Mary
Golbert, Jane
Haworth, Anne
Hines, Jean
Hood, Sally
Hornby, Helaine
Huber, Kay
Huelsmann, Shirley
Jones, Alice
Lee, Patricia
McNichols, Therese
Merrill, Patricia
Michelman, Ellen
Moses, Margie
Nagan, Judith
Nagel, Joyce
Parnall, Mary Ellen
Rabin, Yemina
Redmount, Ann
Sebert, Suzanne
Simon, Karin
Smith, Sara
Strong, Gertrude
Swygert, Dianne
Watson, Joyce
Woodey, Barbara
Lefcoe, Michele

COFFEE HOUR

for

Wives of Participants and Faculty

LAW TEACHING CLINIC
WEDNESDAY, AUGUST 4

BLUE LOUNGE, LOWER LEVEL, THE TOWERS

10:15 A.M. - 11:15 A.M.

BABYSITTING provided by KATHE, DICK, MIMI and BETH HUBER

in the 7th and 5th Floor Lounges

WE LOOK FORWARD TO SEEING YOU!

Kay Huber
Sara Smith
Gertrude Strong

Campus Points of Interest:
- Wisconsin Alumni House
- Wisconsin Union (Memorial Union)
- State Historical Museum
- Elvehjem Art Center
- Observatory Hill Drive
- Top of Van Vleck Hall
- Top of Van Hise Hall

City Parks:
- Vilas Park (also includes Zoo)
- Warner Park
- Tenney Park
- Hoyt Park
- James Madison Park

Cruises on Lake Mendota:
- Capital Lakes Cruises
  - Proprietor - Mr. Fuller, 1834 Rowley Avenue 238-3622

Golf Courses:
- Cherokee Country Club, [illegible] North Sherman 249-1000
- Glenway Municipal Golf Course, 3747 Speedway Road 266-4737
- Lake Windsor Country Club, Lake Windsor, Deforest 846-3607 or 845-3777
- Menona Municipal Golf Course, 4718 Monona Drive 266-4736
- Odana Hills Municipal Golf Course, 4635 Odana Road 266-4724
- Yahara Hills Golf Course, 6701 East Broadway 838-3949

Swimming:
- Mendota Lakefront (Memorial Union)
- Natatorium - Call Mr. Wegner 262-3743 for reservations

Tennis:
- Nielson Tennis Stadium - Call 262-0410 for information and reservations

Tours of Historical Society:
- Arrange with Mr. Lance Neckar - 262-9567

Tours of Wisconsin Union and Campus:
- Arrange with Reservations Office, Wisconsin Union

Tours of City of Madison or Surrounding Areas:
- Sager-Wilson Travel Bureau, 123 West Washington Ave., Madison, Wisconsin
  - Attention: Arthur Haugen, Telephone 257-4444 (also arrange charter busses)

List of Suggested Madison Restaurants

(Not intended to be exclusive)

Das Brathaus 603 State Street 255-5736

Crandall's 116 South Hamilton 255-6070

Heritage House 3855 East Washington Ave. 249-7687 (no bar, nice for children)

Hoffmann House East 3710 East Washington Ave. 244-3557

Hoffmann Steak House 736 North Midvale Blvd. 231-4795

Maxine's French Quarter 3520 East Washington Avenue 249-6405

Nino's Steak Round-Up 4214 East Washington Ave. 249-6431 and
4541 West Beltline Road 271-7781

Poole's Cuba Club 3416 University Avenue 233-5364

Poole's Northgate 1291 North Sherman Avenue 249-7374

Porta Bella 425 North Frances Street 256-3186

Rhodes 613 West Main Street 255-7234

Nom Yee's 208 King Street 255-1040

Two Middleton Restaurants

Goalpost 2611 Branch Street 836-7781

Minnicks Top Hat 1905 Branch Street 836-3631

West from Madison

A. Mt. Horeb, via U.S. 18-151 (22 miles). Just east of town is Karakahl Inn, which has a very attractive dining room. West of the town are three attractions: 1. Little Norway, a unique collection of Norse buildings, relics, etc. assembled on the homestead of an early Norwegian settler. This "Valley of the Elves", and the surrounding country area, are beautiful. For adults the admission to the Valley is $1.25; for children 6 to 12, $1.50. Hours are 9 to 7. 2. On July 31, the Mt. Horeb community will give the final summer presentation of "Song of Norway", the story of Edward Grieg. The cast is largely local with a few imports for some of the leads. The costumes are Norwegian and the production good. Price $2.50 for adults, $1 for 10-18 yrs., free for children under 10. Time 8-10:15 p.m. Take a sweater or coat and blanket; the play is staged in a chairless, outdoor amphitheatre that in the winter serves as the beginner's slope of the Tyrol Ski Basin. 3. Cave of the Mounds, discovered in 1939, features striking and colorful formations. Summer hours are 8 to 7. Admission: (prices not secured). Cave temperature: uniform 46 degrees.

B. Spring Green, via U.S. 14 (39 Miles). In, or near, the town of Spring Green are five good restaurants; Mr. D. Steak House, the Dutch Kitchen, the Round Barn, Apple Hill, and The Spring Green. The last named, designed by Frank Lloyd Wright (whose home is nearby) and overlooking the beautiful Wisconsin River, is by far the most appealing. Dinners are served from 5:30 to 10 Monday-Friday, Saturday til 11, and Sunday to 9. Moderately priced, considering the beauty of the locale and the excellence of the food. The exact location of this restaurant is 3 miles south of the town on Wisconsin 23, just after the Wisconsin River is crossed.

The Robert Gard Theatre in the town of Spring Green will present "Bits and Pieces", a pantomime, on July 30 and 31, and the "Barber of Seville" on August 6 and 7. Adults $3, half-price for those under 18. Curtain 8 p.m. The theatre features, daily, a Frank Lloyd Wright Documentary at a charge of $1 for adults, and $.50 for children over 7. There are three showings: 11 a.m. 2 p.m. and 4 p.m. Time: 30 minutes.

Ten miles south of Spring Green is the House on the Rock, a spectacular development designed by a Madison architect and constructed on a huge chimney; rock rising 59 feet atop a high hill and 450 feet above the beautiful surrounding Wyoming Valley. Admission is $2 for adults, $.75 for children. Hours: 8 to 8 daily.

Between the House on the Rock and the town of Spring Green are the Wyoming Cheese Factory; Taliesin, the home of Frank Lloyd Wright (not open to the public); Tower Hill State Park, with its shot tower; and Hillside School, Frank Lloyd Wright's school. (The school is likely to be open by August 1). Tours provided by students, are $2.

South of the House on the Rock are the town of Dodgeville and Govenor Dodge State Park. There will be in the Park, on July 31 and August 1, performances of "Symphony of the Hills." Admission to the concerts is free, but a good-will offering is taken. Time: 8 P.m. No data on restaurants in Dodgeville.

East from Madison

Milwaukee, via I-94, (77 miles). Points of interest are identified in a separate brochure provided by the Milwaukee Convention and Visitors' Bureau.

Northwest from Madison

A. Waunakee, via Wisconsin 113 (10 miles). A Village Centennial will be held in Waunakee on August 7 and 8.

B. Baraboo, via U.S. 12 (36 miles). Baraboo is the location of the Circus World Museum, operated by the Wisconsin Historical Society. The Clinic, on Saturday, July 31, will host participants, faculty, wives and children, those interested in this trip and needing transportation, please sign names on the bulletin board of the Towers by Thursday, July 29. Our guide will be Mr. Glen Hill, a native of Baraboo who has kindly made arrangements for this visit at the Museum. Sandwiches, soft drinks, etc. can be had on the circus grounds. The Towers will substitute supper for lunch on this day. The Hours are 6 to 8 p.m. Returning, some will want to visit Devil's Lake State Park, or the Mid-Continent Railroad Museum, or both, before returning to Madison.
There will be a Summer Art Festival at Baraboo on August 7-8.

C. North Freedom, via U.S. 12 and Wis. 136 (40 miles). Here is located the Mid-Continent Railroad Museum, operated by the Mid-Continent Railway Historical Society. Open seven days a week. Fares on the "Rattlesnake Line" are $1.75 for all over age 11, $.75 for children through 11, babies in arms free. There are three afternoon trains, with each trip one hour. Lower rates for groups of twenty or more can be had by prior arrangements.

D. Wisconsin Dells, via U.S. 12 (48-50 miles). The Dells constitutes twelve miles of the Wisconsin River that features beautiful rock formations. Boat trips are available every half hour on the Upper Dells and the Lower Dells. Fares: Upper Dells, $3.50 for adults and $1.75 for children; Lower Dells, $2.50 for adults and $1.75 for children. There are walking trails and adjacent attractions.

Close by are two further attractions of special interest to children. One mile north is Little Steam Railroad, providing a 2 mile ride on a steam train. The train operates every hour during every day of the week. Fares: $.65 for adults, $.35 for children ages 2-11. One and one-half miles south is Storybook Gardens. Open every day. Charges: $1.50 for adults, $.75 for children.

Southwest from Madison

New Glarus, Green County, via U.S. 18 and Wis. 69 (27 miles). The area is called Little Switzerland, having been settled about 125 years ago by the Swiss whose descendants carry on some of the Swiss traditions. There is a Swiss Lace factory in the town, with a new sales outlet, by the name of Swiss Miss. The factory is open Monday-Friday 8 until 4 p.m. The sales room on Wisconsin 69 is open Monday- Saturday 8-5; Sunday 12-5. Swiss-American food can be found at Hofmann's William Tell Swiss Club and at Robbie's New Glarus Hotel. The latter features Swiss music from 9 p.m. on Friday and Saturday, with Robbie yodeling at 10:30 p.m. Both restaurants are in chalet style. There are two museums; Historical Swiss Village, and Chalet of the Golden Fleece. The founding of the Swiss Nation in 1291 will be celebrated by a Swiss Volkfest, Sunday, August 1.

APPENDIX F

this summer

FOR SEMINARS · INSTITUTES · SYMPOSIUMS

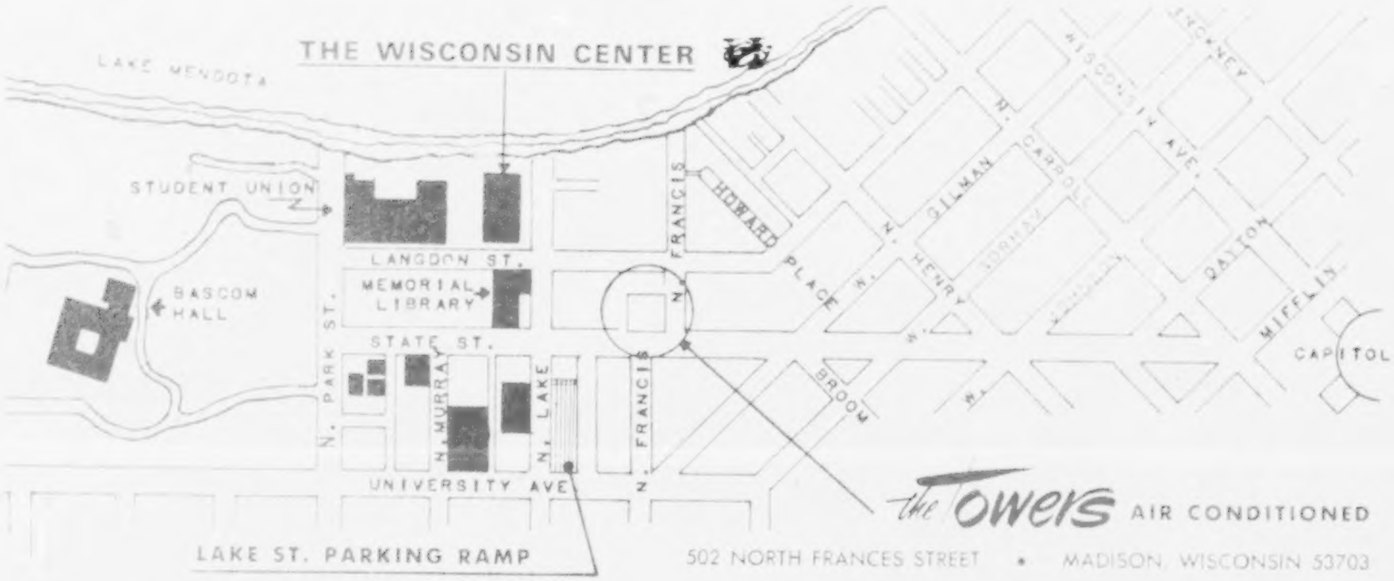
air conditioned — complete facilities

- Wisconsin Center One Block
- 500 Car Parking Ramp One Block
- Two Double Rooms With Private Bath
- Twin Box and Inner Spring Beds
- Maid Service
- Private Conference Rooms

- Receptionist - Switch Board 24 Hours
- Free Direct Dial Local Calls
- Public Address and Paging Systems
- Shopping - Churches - Entertainment
- Dining and Indoor Recreation Areas
- Four Roof Top Sun Decks
- Luxurious Lounges

the Towers

502 NORTH FRANCES STREET
MADISON, WISCONSIN 53703 · PHONE NO. 257-0701-AREA CODE 608



the Towers AIR CONDITIONED
502 NORTH FRANCES STREET • MADISON, WISCONSIN 53703

the Towers
502 NORTH FRANCES STREET
MADISON, WISCONSIN 53703
PHONE 257-0701 - AREA CODE 608

Adjacent to the
UNIVERSITY of WISCONSIN

this summer

- **SEMINARS**
- **INSTITUTES**
- **SYMPOSIUMS**

LAW CLINIC - July 25 - Aug. 14

NAME	ROOM	
~~Adams, Roy M.~~	~~1018~~	
Ball, Vaughn C.	604	(Aug. 9-13)
Blakey, Walker J.	1017	
Bard,	615	(July 28-30)
Brown, Louis	915-916	
Cardi, Vincent P.	515	
Cardozo, Michael	603	(Aug. 8-13)
Carl, Beverly	419	
Cavanaugh, Gerald A. Jr.	618	
Crowe, William L.	819	
Curry, Earl M. Jr.	312	
Edgar, J. Hadley Jr.	315-16	
Fagg, Fred D. III	416	
Feldman, Stephen R.	712	
Flickinger, Garret	602	(Aug. 12-13)
Ferster, Elyce Z.	418	
Frank, John	319	(July 26 + 28)
Freeman, Alan D.	907-908	
Friedman, Lawrence	905	
Gallivan, Gerald M.	807-808	
George, Lawrence C.	307-308	
Gilmer, Wesley, Jr.	909	
Gregory, John D.	513	
Golbert, John P.	412	
Haworth, Charles R.	409	
Hines, N. William	813-814	
Hood, David R.	715-716	
Hornby, D. Brock	309	
Huber, Richard G.	801-2-3-4	
Huelsmann, Martin J.	713-714	
Hughes, Joyce A.	1012	
Hughey, Jerome O.	416	
Hurd, Wilson S.	519	
Irving, John	512	
Jones, Harry	1015-1016	
Kane, Paul M.	414	
Kelso, Charles	917-918	
Knowlton, Sam D.	413	
Kurlantzick, Lewis	615	(July 28-30)
Lee, Richard Diebold	401-402	
Levy, Robert	1005	
Lockyear, Thomas A.	317-318	
McCullough, Ralph	601	(Aug. 8-9)
McNichols, William J.	301-302	
Mennell, Robert L.	403	
Merrill, Fredric R.	517-518	
Michelman, Frank	707-8-9	
Moody, Lizabeth	417	
Moorhead, Michael J.	505	

NAME	ROOM	
Moses, Ray E.	812	
Myers, Webster	1008	(Aug. 8-9)
Nagan, Winston P.	306	
Nagel, Stuart S.	507-508	
Neal, Phil	609	(Aug. 12-13)
Pagano, Anthony J.	404	
Parnall, Theodore	815-816	
Pedersen, Donald B.	405	
Penegar, Kenneth	809	(Aug. 8-12)
Puklin, Thomas R.	406	
Pye, A. Kenneth	605	(Aug. 11-13)
Rabin, Robert	705-706	
Redmount, Robert	701-702-719	
~~Ritchie,~~	~~407~~	
Rosenberg, Maurice	619	(Aug. 10)
Ryan, David L.	408	
Schneider, Frederick R.	314	
Sebert, John A. Jr.	913-914	
Shepard, Ira B.	313	
Simon, Peter N.	805-806	
Smith, Richard	901-902	
Spector, Robert G.	318	
Speidel, Richard	817-818	
Strong, Frank R.	1001-1002	
Sullivan, David E.	617	
Swygert, Michael I.	305	
Tabac, William Louis	614	
Taggart, Walter J.	912	
Tollett, Kenneth	606	(Aug. 12-13)
Toal, William T.	616	
Torke, James W.	613	
Uelmen, Gerald F.	612	
Vetri, Dominick	1004	
Ward, Thomas M.	1003	
Watson, Andrew	1014	
~~Weidner,~~	~~717~~	
Woodey, J. Joel	607-608	
Zimmer, Michael J.	718	

RE: ROOMS FOR LAW TEACHING CLINIC

Rooms for Small Group Sessions

Faculty Library I
Faculty Lounge II
Second floor reading room III (Library Wing)
Room 132 IV
Room 136 V
Room 157 VI

Rooms for General Sessions

Room 225

Faculty Offices

Room 601	Phone:	262-1542	Brown, Friedman, Jones
Room 611		262-1610	Kelso, Redmount, Watson
Room 612		262-2243	Hines, Lefcoe, Levy
Room 501		262-3423	Michelman, Rabin, Speidel

SMALL GROUP I

Group Leader: Hines

Alan D. Freeman, Minnesota
Wesley Gilmer, Jr., Cincinnati
Martin J. Huelsmann, Chase
Richard D. Lee, California (Davis)
Robert L. Mennell, Southwestern
Donald B. Pedersen, William Mitchell
Michael I. Swygert, Valparaiso
James W. Torke, Indiana-Indianapolis
Thomas M. Ward, South Carolina

SMALL GROUP II

Group Leader: Lefcoe

Walker Blakey, North Carolina
Gerald Cavanaugh, Jr., Loyola (Los Angeles)
Elyce Z. Ferster, George Washington
David R. Hood, Wayne State
Paul M. Kane, Boston College
Michael J. Moorhead, Howard
Theodore Parnall, New Mexico
John A. Sebert, Jr., Minnesota
David E. Sullivan, Texas Tech
William L. Tabac, Cleveland-Marshall

SMALL GROUP III

Group Leader: Levy

William L. Crowe, Loyola (New Orleans)

Stephen R. Feldman, Harvard
D. Brock Hornby, Virginia
Wilson S. Hurd, Detroit
John Irving, Seton Hall
Fredric R. Merrill, Oregon
Lizabeth A. Moody, Cleveland-Marshall
Ira B. Shepard, Georgia
Walter J. Taggart, Villanova
Gerald F. Uelmen, Loyola,(Los Angeles)

SMALL GROUP IV

Group Leader: Michelman

George Bunn, Wisconsin
Earl M. Curry, Jr., Akron
Gerald M. Gallivan, Wyoming
John P. Golbert, Southwestern
Joyce A. Hughes, Minnesota
Ray E. Moses, South Texas
Anthony J. Pagano, Golden Gate
David L. Ryan, Washburn
Robert G. Spector, Loyola (Chicago)
William T. Toal, South Carolina

SMALL GROUP V

Group Leader: Rabin

Vincent P. Cardi, West Virginia
J. Hadley Edgar, Jr., Texas Tech
Lawrence C. George, Florida State
John D. Gregory, Hofstra
Jerome O. Hughey, Northwestern (Portland)
William J. McNichols, Oklahoma
Winston P. Nagan, Valparaiso
Thomas R. Puklin, Loyola (New Orleans)
Peter N. Simon, Colorado
Dominick R. Vetri, Oregon

SMALL GROUP VI

Group Leader: Speidel

Beverly Carl, Southern Methodist
Fred Fagg, III, Northwestern
Hugh J. Gibson, Southern California
Charles R. Haworth, Washington University (St. Louis)
Sam D. Knowlton, Florida State
Thomas A. Lockyear, Loyola (Chicago)
Stuart S. Nagel, University of Illinois (Pol. Sci.)
Frederick R. Schneider, Chase
J. Joel Woodey, Maryland
Michael J. Zimmer, South Carolina

APPENDIX G

LISTENING ROOM

Brown, The Lawyer-Client Consultation
Two one-hour tapes presenting dramatizations of lawyer-client interviews and critique thereof. Recorded October, 1970 for the California Continuing Education of the Bar

VIEWING ROOM

Films

Finals, Mock Law Office Competition, Los Angeles, Spring, 1971

Jones, Dialogue on Contracts (a "Great Teacher" film)

Mentschikoff, The Problem Method in Commercial Law (a "Great Teacher" film)

Regionals, Mock Law Office Competition, Spring, 1971 (Midwest and West)

Video Tapes

McDougal, Myres S., Lecture on "Law, Science and Policy"

Lefcoe, George and McDougal, Myres, Debate on the Lasswell-McDougal "Law, Science and Policy"

Levy, Family-Law Counselling Session

Washington Regional, Mock Law Office Competition, Spring 1971

READING ROOM

Learning Theories - General

Bruner, Jerome S., The Process of Education (1963) (6 copies)

Bruner, Jerome S., Toward a Theory of Instruction (1966) (6 copies)

Bruner, Jerome S., The Relevance of Education (1971) especially Chapter 8 (3 copies)

Keppel, Francis, The Necessary Revolution in American Education (1966) (4 copies)

Postman, Neil, and Weingartner, Charles, Teaching as a Subversive Activity (1969) (3 copies)

Silberman, Charles E., Crisis in the Classroom (1970) (2 copies)

Strong, Frank R., Memoranda on Legal Education (1968) Memo #2 (10 copies)

READING ROOM (Continued)

Learning Theories - Law

Lasswell, Harold D. and McDougal, Myres S., Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. #2 (1943) (4 copies)

McDougal, Myres S., Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry, 4 Journal of Conflict Resolution #3 (1960) (4 copies)

McDougal, Myres S., Jurisprudence for a Free Society, 1 Ga. L. Rev. #1 (1966) (2 copies)

McDougal, Myres S., Lasswell, Harold D., and Reisman, W. M., The World Constitutive Process of Authoritative Decision, 19 Journal of Legal Ed. #3 (1967) (8 copies) and 19 id. #4 (1967) (2 copies)

Rutter, Irvin C., A Jurisprudence of Lawyers' Operations, 13 Journal of Legal Ed. #3 (1961) (5 copies)

Strong, Frank R., Memoranda on Legal Education (1968) Memos #1, 3 - 11 (1968) (10 copies)

Symposium on Legal Education, 21 U. of Miami L. Rev. #3 (1967) (2 copies)

Symposium on Legal Education, 54 Va. L. Rev. #4 (1968) (1 copy)

Symposium on Professional Education in the Contemporary University, 32 Ohio St. L.J. #2 (1971) (2 copies)

Watson, Andrew S., The Quest for Professional Competence: Psychological Aspects of Legal Education, 37 U. of Cincinnati L. Rev. #1 (1968) (6 copies)

Teaching Materials and Methods

AALS, 1966 Committee on Teaching Methods, 1966 Proceedings, Part I, pp. 198-250 (11 copies) (Problem Method)

Allen, Layman E. and Caldwell, Mary E., Communication Sciences and Law (1965) (2 copies)

Benfield, Marion W., Social Justice Through Law: New Approaches in the Law of Contracts (1970) (3 copies) (Foundation Press)

Levin, A. Leo, and Cramer, Harold, Trial Advocacy: Problems and Materials (1968) (1 copy) (University Casebook Series)

Plager, Sheldon J., Social Justice Through Law: New Approaches in the Law of Property (1970) (2 copies) (Foundation Press)

READING ROOM (Continued)

Teaching Materials and Methods (Continued)

Rutter, Irvin C., Teaching Methods as Exemplified by Training in Lawyers' Operations (Mimeo, 1969) (1 copy)

Symposium, Needed Innovations in Legal Education, 1969 Law and the Social Order #1 (1969) (4 copies)

ABA, Code of Professional Responsibility (1969) (5 copies)

Firman, Ted, Civil Litigation and Professional Responsibility (1966) (3 copies) (Council on Education in Professional Responsibility)

Kitch, Edmund W., editor, Clinical Education and the Law School of the Future, University of Chicago Law School Conf. Series #20 (1969) (3 copies)

Mathews, Robert E., Problems Illustrative of the Responsibilities of Members of the Legal Profession (2d rev. ed. 1968) (4 copies) (Council on Legal Education for Professional Responsibility)

Nat. Council on Legal Clinics, Problem Case on Professional Responsibilities of the Advocate, Parts One and Two (circa 1963) (6 copies)

Pincus, William, The Lawyer's Professional Responsibility, 22 Journal of Legal Ed. #1 (1969) (7 copies)

Pincus, William, The Clinical Component in University Professional Education (Mimeo, 1970) (2 copies)

Sacks, Howard R., editor, Proceedings, Asheville Conference on Education for Professional Responsibility (1966) (1 copy)

Smedley, T. A., Professional Responsibility Problems in Family Law (1963) (2 copies) (Council on Education in Professional Responsibility)

Smedley, T. A., Professional Responsibility Problems Relating to Mortgage Transactions (1966) (3 copies) (Council on Education in Professional Responsibility)

Weckstein, Donald T., editor, Education in the Professional Responsibilities of the Lawyer (1970) (1 copy)

Curriculum

AALS, Report of 1966 Curriculum Committee, 1966 Proceedings, Part I, pp. 37-54 (11 copies)

READING ROOM (Continued)

Curriculum (Continued)

AALS, Papers of 1967 Curriculum Committee Meeting, 44 Denver L.J. Special Issue (1967) (5 copies)

Stevens, George Neff, The Three Responsibilities of Legal Education: Time for Clarification, 1 Texas Tech. L. Rev. #1 (1969) (5 copies)

Law School and Legal Profession in Transition

AALS, Anatomy of Modern Legal Education (1961) (1 copy)

Christensen, Barlow F., Lawyers for People of Moderate Means (1970) (8 copies) (American Bar Foundation)

Morris, Arval A., Student Participation in Law School Decision-Making (Mimeo 1969) (3 copies)

Symposium, Law and Society: The Challenge of the Seventies, 47 N. C. L. Rev. #3 (1969) (4 copies)

Symposium, Minority Students in Law School, 20 Buffalo L. Rev. #2 (1971) (2 copies)

Warkov, Seymour, and Zelan, Joseph, Lawyers in the Making (1965) (3 copies)

ED 067995

AALS

LAW TEACHING CLINIC

1971

COPY 1

ATTACHMENT I

To be published in the Journal of Legal Education and used as a monograph for the A.A.L.S. Law Teaching Clinic.

A CONCEPTUAL VIEW OF THE LEGAL EDUCATION PROCESS [1]

Robert S. Redmount [2]

The insurgency of educational reform in law is no longer the ideological spasm of a spirited liberal or the idiosyncrasy of a few brilliant teachers with mental quirks. The new radicalism is beginning to enter the mainstream of legal education, goaded not a little by the complicated phenomena and momentous events with which law must deal. Law schools search for a newer and more satisfying identity through curricular movements that espouse clinical training, public and policy oriented law, lawyering emphasis, social science incorporation, and more.

---

[1] I am immensely indebted to Professor Frank Strong, Director of the Law Teaching Clinic, A.A.L.S., for the impetus for this article. Professor Strong's continuing efforts to improve the legal education process and prepare new law teachers for their careers have been mirrored to me in his energy as a law teaching administrator and in his own ideas as a legal educator. Inevitably, his ideas and experience, which I garnered through his prior articles in the Journal of Legal Education ("Pedagogical Implications of Inventorying Legal Capacities" 3 J. Leg. Ed. 555 (1951); "Further Observations on Pre-Legal Education," 7 J. Leg. Ed. 540 (1955)), his memoranda and correspondence with me, and as a member of his Clinic Faculty, have influenced my thinking. His promptings have particularly helped in the effort to make psychological conception more viable in the legal education context. I have also borrowed from his framework for the functional analysis of legal education in this article and elaborated it in terms that, I hope, do not do violence to his cohering theoretical view. Having offered many helpful suggestions, Professor Strong has, in a very real sense, written this article with me, though I would not ask him to claim responsibility for the form and substance that have emerged.

[2] The author is not a legal educator. His interests in the educational process were early stimulated by his graduate training at the New York University School of Education, where he received his doctoral degree in the field of psychology. His insights and perspectives on legal education are principally the result of a later experience as a silent participant-observer at the Yale Law School, where he received his degree in law. The author's focus on the experiential character of law and legal education is nurtured indirectly through the clinical practice of psychology and its concern with human transactions and meanings and problems in experience. Over the years correspondence with law professors Louis M. Brown, Thomas L. Shaffer and Frank R. Strong, and occasional participation in the teaching interests of professors Delmar Karlen and Gerhard O. W. Mueller, have been instrumental in sustaining and developing various interests and ideas relating to the legal and legal teaching process. Gratitude is expressly felt toward these men, and herewith acknowledged, for sharing their thoughts and interests. Lastly, it may be noted that a more explicit rendering of the author's viewpoint about legal education is provided in a recent article, "Humanistic Law Through Legal Education," 1 Conn. Law Rev. 201 (1968).

There is a clash of minds on essentials and priorities but throughout there is lacking some cohering conceptual framework through which to identify, measure and direct changes in legal education. Legal education is not specifically training in rhetoric, logic and politics according to a Roman tradition. Neither is it the study and absorption of Justinian or Gratian codes, or some other. Nor is it simply syllogistic inquiry applied to the cases of appellate courts. It is no longer just dialectical skills applied to a body of arcane information and knowledge.

The "new" legal education, whatever its denomination and character, may encompass logic and psychology, empirical inquiry and rationalism, ethics and social action. It is process-oriented in a society that is ever-moving. It is tradition-bound in a society that needs some viable standards and constancies. Our aim is to draw a conceptual map of or for the legal education process. It may help to identify and direct the character and composition of legal education and, in so doing, bring us closer to Milton's educational ideal: "a complete and generous education [is] that which fits a man to perform justly, skillfully and magnanimously all the offices both private and public, of peace and war."

Our conceptual model has two levels. At one level, the legal education process is defined in terms of functional utility. At another, it is concerned with operational realities. The operational realities may ultimately be comprehended in terms of analytical requirements for effective education.

1. The Functional View of Legal Education

A. The Teaching-Learning Process.

The aim of the teaching-learning process is to cultivate the development of professional tools and knowledge within their appropriate context. Mortimer Adler, whose views of education follow in the philosophic tradition of the erstwhile law scholar, Hutchins, and the great theologian, Newman, captures a good part of the emphasis here in his statement that, "Education is the process by which those powers (abilities, capacities) of men that are susceptible to habituation, are perfected by good habits, through means artistically contrived, and employed by any man to help another or himself achieve the end in view."[3] The aim is, further, to sustain and encourage in the student continuing intellectual curiosity, personal involvement and social responsibility. Juxtaposed next to Adler's view we may here place the views of the monumental educational and social philosopher, John Dewey. At one point, Dewey, who is the inheritor of the democratic educational views of philosophers like Rousseau and educational theorists like Froebel and Pestalozzi, captures the flavor of energy, concern and participation when he says "The social environment consists of all the activities of fellow beings that are bound up in the carrying on of the activities of any of its members. It is truly educative in its effect in the degree in which an individual shares or participates in some conjoint activity. By doing his share in the associated activity, the individual appropriates the purposes which actuate it, becomes familiar with its methods and subject matters, acquires needed skill, and is saturated with its emotional spirit."[4]

The teaching-learning process is a composition of (1) teaching and learning capacities, (2) compatible and purposive relationship between student and teacher, and (3) the clarification and implementation of educative means and goals.

1. Student Capacity and Disposition. The law student is not quite the tabula rasa John Locke considers a neophyte to be.[5] His intellectual capacities and dispositions

---

3. Adler, "In Defense of Philosophy of Education," in The Forty-First Yearbook of the National Society for the Study of Education, Part 1, Philosophies of Education 238, 274 (1941).

4. Dewey, Democracy and Education p. 26 (1916).

5. Locke, at the dawn of a newer psychology of man approximately in the eighteenth century, sought to refute the notion that man was a collectivity of inherited faculties and dispositions who could learn (be taught) very little. Instead, he posited the idea that man's mind, as a child, was in the nature of a tabula rasa on which could be cumulatively etched different kinds of learning. See Locke, An Essay Concerning Human Understanding, Book I (Dover edition, 1959, pp. 37-118). Our knowledge of psychology, and especially the psychology of unconscious processes, in this century advises us that acquired if not inherited dispositions influence and may even direct what and how we learn.

are to some extent shaped and exercised. Intelligence varies in degree and also in quality.[6] The brighter person needs more varied mental activity and challenge else he becomes bored and restless. The person whose capability is less may struggle more merely to grasp and master what others define as his learning goals and requirements. Characteristic styles in thinking vary and serve different purposes.[7] Some individuals are quick to note

---

[6] Intelligence is a well-studied psychological phenomenon. Its existence or operation in substantial measure is largely assumed at the level of professional learning. Individual variations in intelligence make for differences in learning capacity and dispositions. Some students may show an intelligence that is more quick and intuitive; others appear to be more methodical and perhaps plodding in the way they are able or disposed to use their intelligence. Their grasp may be slower, and it may be surer. The intelligence of some may be more creative and innovative; others may tend to learn more conventionally and implement effectively. The intelligence of most law students is likely to reflect itself more in "verbal" reasoning and expression in language and less in "numerical" or mathematical reasoning and facility in scientific symbols. The most sophisticated conception of intelligence is that of the distinguished psychologist, Piaget. See Piaget, *The Psychology of Intelligence* (Piercy and Berlyne trans. 1950).

[7] Thinking processes present another area of concentrated inquiry in psychology. Thinking, in elemental logical terms, concerns itself with such processes as the use of inference, association and dissociation, classification, denotation and the like. At a higher level of abstraction, thinking in law may be said to be concerned with concept development and problem-solving. Bruner, Goodnow and Austin, in their *A Study of Thinking* (1956), have identified different strategies in the development of concepts. They note, for example, that some concept-formers use one typical or repeated reference element or group of reference elementsand associate other elements to this. This is much in the manner of construing subsequent cases in the light of existing doctrine - a principal medium for law learning. Others may scan matter and seek logical connectives or consistencies that afford an independent basis for concept formation. This more creative process may be renewed with each new, large infusio of matter. Logical or others means are utilized to combine discrete concepts, instead of referring new matter and conception to some prior, basic conceptual criterion and reference point. This kind of conception is more akin to the inductive thinking processes that characterize experimental science.

Bruner, Goodnow and Austin also differentiate kinds of concepts. Some, denominated *conjunctive*, require that all fundamental attributes of the concept must always be present if the concept is to hold form. The *disjunctive* type of concept, on the other hand, may permit of some variation in the degree to which all fundamental attributes are represented without doing violence to the integrity and meaning of the concept. Some concepts of criminal law, for example, appear to be conjunctive but many concepts in law are disjunctive.

Problem-solving, in the view of experimental psychologists, tends to reduce itself to two lines of theory. Some, notably behavioristically-oriented psychologists, tend to view problem-solving as a matter of acquiring certain habits of thought by means of discrete, sequential operations. See, for example, Berlyne, *Structure and Direction in Thinking* (1965) and Maltzman, "Thinking From a Behavioristic Point of View," 12 *Psychol. Rev.* 275 (1955). Problem-solving through case analysis reflects this mode and represents the principal means by which problem-solving is taught and may be experienced in law. Other psychologists, who are more "gestalt-oriented," tend to see problem-solving as a matter of problem structure contributing to an all-at-once organization of ideas that ultimately forms insight. The tendency to think in terms of "gestalten," or in combinative forms that may not follow simple logical sequence, has been a thrust of one segment of learning theory in psychology for more than a half century The classical example of this mental operation, readily apparent in the field of music, is disparities, ambiguities and uncertainties. Their thinking style may contemplate challenge and new possibility as a means of fulfillment.[8] Others are more inclined to adhere to a fixed thinking pattern or conceptual design.[9] They find more security in bending disparate fact and experience, wherever possible, to a notion or a feeling of preexisting harmony. There are also individual differences in problem solving styles.[10] Some find more meaning and satisfaction in exploring broader issues and dealing with more general concepts. Others find more simplicity and their purpose is served in neat and concise definition and in the careful development of detail. The analytical disposition responds best to analytical

---

the grasp or "solution" of a melody. Musical notes, in themselves discrete, "spontaneously" combine to form a melody-a whole that is more than the sum of its parts. See, particularly, Wertheimer, *Productive Thinking* (Enlarged edition, 1958). Wertheimer offers many demonstrations of "gestalt" problem-solving. One of these is an effort to trace the creative thinking processes of Einstein in developing his theory of relativity. See also Katona, *Organizing and Memorizing* (1940).

[8] In comparatively recent years, the concept of "cognitive dissonance" in thinking experience has achieved prominence. Here it is noted that when attitudes, and facts and ideas, are not harmonious - where incompatibilities and uncertainties exist and are noted - a powerful impetus is set up to produce reevaluation and change. Matters under focus can become suddenly stressful or complex and generate needs for reformulation and a more convincing and comfortable way of dealing with issues. See, particularly, Festinger, *A Theory of Cognitive Dissonance* (1957). The law teacher may identify here a technique employing the "cognitive dissonance" principle that dates back to Socrates. He disconcerts the student and jars his usual mode of thinking, thus encouraging new thinking pathways. But see note 39, *infra*.

[9] Ausubel, in summarizing cognitive structure in the individual, notes that the positive working elements are concepts, principles, transactional terms and "available functions." The negative elements are the preservation of inapplicable habitual sets (*einstellungen*) and "functional fixedness" or the pre-emptive influence of more established or conventional use. See Ausubel, *Educational Psychology: A Cognitive View*, pp. 538-39 (1968). For thinking to be instrumental and effective in problem solution, and for it to be creative, it is important that thinking patterns not be overly rigid or obsessive. This is a phenomenon associated with certain personalities who deal with feelings and problems by intellectualizing too much and who may be obsessive in character.

It is important to observe that thinking and, generally, processes of cognition are not strictly logical. They include both intellectual and emotional elements. Frenkel-Brunswick some years ago introduced the concept of "intolerance of ambiguity," inferring that some persons in their thinking are much inclined to take a "black and white" attitude on issues. They cannot tolerate the uncertainty or ambiguity in experience and classify too quickly or peremptorily. See Frenkel-Brunswick, "Intolerance of Ambiguity as an Emotional and Perceptual Personality Variable," 18 *J. of Personality* 108 (1949).

[10] *Cf.* reference to problem-solving in note 7, above.

training and may be more logical in the approach to life problems. The more intuitive disposition[11] may strive for more relevance and satisfaction even at the expense of such discipline.

Emotional capacities and dispositions similarly reveal individual differences.[12] Differing patterns of emotional behavior reflect the individual's characteristic ways of coping and defending in relating to life.[13] Emotions may be suggested or revealed in the attitudes and tolerances of the student and in his perceptible drives and motivations.[14] These may be influenced by further learning but, likely as not, they may effectively direct individual learning and determine its uses and benefits. Involvement and concern are generative influences that characterize the emotions and behavior of some students. Their attachment to some issues or problems provides a motivating force that focuses the ends and sometimes the means in learning. They may be aggressive, affiliative or inquisitive in their expression of concern and they may be intolerant of that which is merely academic or pedantic. Self-seeking, such as for security or superiority, is an emotional disposition that generates the will and the need to learn in many students. An achievement motive nurtures the learning experience and the desire for survival and success spur inquiry and competitiveness.[15] There may be intolerance for that which is merely abstract and not of recognizable use. Some students may show more involvement, determination and direction. They tend to structure their own learning needs and tolerances. Others may show more detachment, receptivity or uncertainty. They may be more amenable as to both the means and goals in learning.

---

[11] Intuitive thinking appears to be a discrete phenomenon and may not adhere to the character of thinking as it is known in more analytical terms. One may say that intuitive thinking is at present in the nature of a construct. Scientific verification relating to how it operates, and the terms and conditions under which it operates, are difficult to achieve. Yet, common sense observation certifies as to its existence and value. Bruner, a proponent of the intuitive mode of thought as an alternative in learning operations, discusses the distinction between intuitive and analytical thinking in Bruner, The Process of Education, pp. 55-68 (1960). He notes that, "Usually intuitive thinking rests on familiarity with the domain of knowledge involved and with its structure, which makes it possible for the thinker to leap about, skipping steps and employing short cuts in a manner that requires a later rechecking of conclusions by more analytical means." P. 58.

Another student of the phenomenon, Westcott, has sought to pull together theoretical and empirical inquiry into the character and process of intuition. His book is a concise summary of knowledge and approach, and appears to be a springboard for further inquiry into intuition as a cognitive process. See Westcott, Toward A Contemporary Psychology of Intuition (1968).

[12] Theories of emotion tend to postulate some conception of drive or impetus that derives from biological and/or social experience and energizes behavior. The drive may express itself as an emotional disposition that is given expression in different patterns of behavior. A series of developmental experiences having principally emotional impact may tend to form and shape the characteristic dispositions and behaviors of an individual that tend to form his personality. This view of emotion as the fundament of differential behavior and personality is widely held among theorists of personality and individual behavior. The Freudian conception is the most notable and its most essential features are presented for lawyers by the psychiatrist and legal educator Watson. See Watson, Psychiatry for Lawyers (1968). An encyclopedic presentation of the subject of emotion from the perspective of academic psychology is presented by Young, Motivation and Emotion (1961).

[13] Coping and defending reflect, in a sense, conscious and unconscious strategies which a person uses in dealing with his "reality." The reader will recognize such mechanisms as rationalization, substitution, projection, denial and the like. Bruner presents a neat analysis and example of the distinction between coping and defending. In essence, one strategy concerns itself with "defensive" or security operations in the individual and the other concerns itself with "offensive" or managing operations in reality. See Bruner, Toward A Theory of Instruction, pp. 129-48 (1966). In largest measure, conception of coping and psychological defense is an outgrowth of theoretical developments in Freudian psychology. The classic reference on the character and operation of ego defenses in personality and behavic is that of Anna Freud, daughter of Sigmund Freud and a distinguished psychoanalyst in her own right. See A Freud, The Ego and the Mechanisms of Defense (1936; revised edition, 1966).

---

[14] Motivation, especially as it relates to learning, has been a well-researched phenomenon. Opinions vary as to the importance of motivation to the learning process but the larger view, shared by this writer, is that motivation is critical. A useful differentiation exists between extrinsic motivation, induced by such as grades and similar rewards - punishments to influence learning, and intrinsic motivation, which may derive from curiosity, the need to feel mastery or competence and the like. Much earlier systematic inquiry into learning concerned itself with the effects of extrinsic motivation. *Cf*. reference to learning theory and inquiry, note 16, *infra*. For inquiry into intrinsic motivation see, particularly, Berlyne, *Conflict, Arousal and Curiosity* (1960) and the review of some research by White, "Motivation Reconsidered: The Concept of Competence," 66 *Psychol. Rev*. 297 (1959).

Motivation affects the degree and kind of memory occurring from learning, as Bartlett observed a generation ago. In general, more personally meaningful and vivid learning is retained best. See Bartlett, *Remembering* (1932). *Cf*. Ausubel, *op. cit. supra*, note 9 at pp. 389-93 for a discussion of the effect of attitudes on meaningful learning and retention. See also the concentrated psychological and educational inquiry on the "achievement motive," note 15, below.

[15] The "achievement motive" has been a special conceptual focus for a group of "personality-oriented" psychologists. See particularly McClelland, Atkinson, Clark and Lowell, *The Achievement Motive* (1953). The "achievement motive" affects involvement, persistence and success in learning. It is a blend of "cognitive drives" or the need to know, status concerns or the need for recognition and esteem, and cultural pressures or the expectation of accomplishment and success. *Cf*. note 37, *infra*.

The teaching-learning process begins not with the subject matter but with the student. If learning is to be relevant and effective it must be formed around the discrete capacities and dispositions of the learner. This means that formal classroom teaching methods will be of more value to some students than others. Some may thrive on the Socratic method but others may learn in a more intuitive or self-determining manner. Some may find meaning and challenge in the policies and concepts of tort or constitutional law. This becomes a stimulus around which their best learning may occur. Others may seek to learn mostly in order to do. They may respond best to a teaching-learning process that is bound to empirical inquiry or clinical experience. The point, in its negative cast, is that there is a genuine loss in learning interest and response when teaching preference or economy focuses only on delivery and is principally concerned with narrowly fixed subject matter and mass instruction.

2. The Experience of Learning. Learning is a process of stimulation, emphasis or connection, and response.[16] The "stimulus" to learning may lie within the individual and be defined by his concerns, interests and objectives. He may wish to help the poor, learn how to conduct litigation or absorb any kind of prescribed law learning that leads to high personal income. The stimulus may also be determined and generated by the character of the teacher-student interaction. A stimulating instructor, an interesting and challenging presentation of subject, a cooperative work approach and feelings of personal identification

---

[16] Learning theory affords a major concentration of experimental inquiry in psychology. Learning theorists for more than a generation have been concerned with such problems as the explication of stimulus-response relationships, the qualities of reinforcement that make for learning, the persistence and modification of learning, the transferrability of learning, and the like. For a readable account of different theories of learning geared to the comprehension of the non-expert, see Bugelski, The Psychology of Learning Applied to Teaching (1964). The widely noted Pavlovian principles of conditionning are included as one major formulation in this account of basic theories. Psychological theories of learning appear to be too arcane, too narrow in conception and deal with elementary characteristics of the learning process to be of much use in the conception of law learning or other advanced learning. Some concepts, such as the principle of contiguity in learning experience and the principle of reinforcement, are useful guideposts but they do not appear to afford a base for understanding and directing the legal education experience.

with the teacher or the subject all have important stimulus value in the learning experience. There is also the popular but less perceptive view that holds the stimulus to learning lies mostly or entirely in the subject matter. It is the problems of law rather than the means of teaching and the experience of learning that are thought to form student interest and application.

The stimulus to learning may be positive or negative in character. Student anxiety,[17] if it is severe, and indifference or revulsion to a teacher, the teaching means or the subject, become the basis for "turning off" from particular learning or learning in general. The negative stimulus may discourage or destroy incentive and motivation that is so important to learning. At times, positive and negative stimuli may compete with one another for the learning attentions of the student. The student's interest in problems of criminal law may sustain his learning effort notwithstanding that he has a noxious instructor and must deal with a dull or repetitive teaching approach.

The "emphasis or connection" in learning is the emotional and intellectual experience of the learner in the teaching-learning process. Emotional arousal, or the lack of emotional arousal, is a determinative influence in further learning. Learning involvement may be intensified if law regarding commercial transactions is put in the context of immediate issues involving real people. The learner may experience some greater empathy and emotional concern. On the other hand, a rather pedantic teacher who confines himself to doctrinal analysis may create emotional indifference in the learner that may be stronger than his motivation to learn. Or, the teacher may employ sarcasm and humiliation as his instructional approach and this may result in student antagonism and the rejection of learning.

---

[17] Student anxiety has long been recognized as an important element in the student capacity and disposition to learn. A modicum of anxiety generally acts as an incentive but intense anxiety and inordinate fear of failure have disintegrative effects on learning disposition and performance. See, generally, Sarason *et. al.*, *Anxiety In Elementary School Children: A Report of Research* (1960). See also Van Buskirk, "Performance On Complex Reasoning Tasks As a Function of Anxiety," 62 *J. Abnorm. & Soc. Psychol*. 200 (1961). Van Buskirk observes that anxiety is an interference in performance where reasoning processes and complex tasks are involved. *Cf*. Rokeach, *The Open and Closed Mind*, pp. 391-410 (1960).

Watson discusses the matter of creating anxiety in the law school classroom and he also elaborates on the effective use of anxiety in teaching-learning. See Watson, "Some Psychological Aspects of Teaching Professional Responsibility," 16 *J. Leg. Ed*. 1, 13, 18-20 (1963). Silver has studied empirically the operation and effects of anxiety in law students, more from the point of view of its operation in learning than its effect upon personality. See Silver, "Anxiety and the First Semester of Law School," 1968 *Wisconsin L. Rev*. 1192 (1968).

A fecund intellectual experience encourages learning and a good learning attitude whereas an arid experience does the opposite. A student may feel a lack of sufficient challenge to thought in family law and the seeming lack of substance may discourage his further learning interest here. A seminal teacher who sees interesting problems and provocative possibilities in a law subject that is otherwise unarresting stimulates learning challenge and intellectual activity. A problem orientation and one that produces a conflict of ideas is a greater intellectual incitement to learning than a situation that requires principally recitation and recall from a student.

The student learning "response" is essentially evidence of a reinforcement or discouragement of his interest and learning involvement. If his learning interest and involvement are supported by what he is taught and the way he is taught, he may show increased initiative and curiosity. His disposition to learn may be exercised by delving into new learning matters, probing further into those that are already familiar to him or proposing experimental methods that offer some different learning possibility. The quality of learning, where learning interest is reinforced, is likely to be characterized by good absorption of learning materials and by sound and imaginative application of what has been learned.

A discouraged response in student learning is evidence of a change in the student, perhaps occasioned by a teaching approach that lacks the value of stimulation or by learning materials whose form or substance lack sufficient relevance for the student. The study of law may be, in part, a disillusioning emotional experience, notably in the highly conceptualistic way in which it treats personal and social experience.[18] A teaching approach may be more concerned with the output of material than with the personal learning experience of the student, and the student may become alienated or indifferent. Excessive difficulty, or lack of difficulty, in learning may also lead to learning discouragement. This may reflect some lack or failure in teacher involvement and teaching methodology or in the form and organization of subject matter. A student who is discouraged in his learning may reflect a lack of retention in what he learns. His performance may be shoddy and he is more likely to show poor skill application.

---

[18] The emotional and consequent learning impact of the teacher and his teaching method in legal education has come under closer scrutiny in recent years. Watson's observations are particularly acute. See Watson, "The Quest For Professional Competence: Psychological Aspects of Legal Education," 37 *U. Cin. L. Rev*. 93, 109-37 (1968); Watson, "Some Psychological Aspects of Teaching Professional Responsibility," 16 *J. Leg. Ed*. 1 (1963), and Watson, "Reflections on the Teaching of Criminal Law," 37 *U. Det. L.J*. 701 (1960). See also Savoy, "Toward A New Politics of Legal Education," 79 *Yale L.J.* 444, 480-83 (1970). The personal and learning impact of conceptual emphases in law teaching is discussed by Redmount, *op. cit. supra*, note 2, pp. 203-06 and *passim*. See also Eron and Redmount, "The Effects of Legal Education On Attitudes," 9 *J. Leg. Ed*. 431 (1957).

3. Teaching Skills, Methods and Goals. Teaching[19] is a complex of skills that include intellectual planning taken in relation to a defined end, interpersonal relation that is at least partly calculated to influence and logical analysis that is concerned with the sequence, organization and relevance of materials. It is these skills acting upon one another that move the teaching-learning process.

Intellectual planning contemplates goals in learning: the absorption of knowledge, the cultivation of attitudes and the development of skills. Good planning also contemplates the character of learning experience in the achievement of these goals. It seeks to develop the attitudes and the skills of inquiry. It encourages a need and disposition to penetrate. It requires and rewards assimilation. The adequacy of inquiring, penetrating and assimilating behavior depends on the effective utilization of the teacher-student relation and the deployment of logical and communications skills.

The teacher, as we have noted, seeks to engage the student in terms of both his intellectual and emotional capacities. The two may reinforce and direct one another. It is the aim of the teacher to cultivate challenge He may do so by using his relationship with the student to stimulate the latter. He may draw on a common bond of interest in intellectual penetration and acuity to push back the boundaries of knowledge in given material. He may draw on a common feeling of an issue of value to seek ways of advancing some important interest or purpose. He may project emphases that highlight and underline the keys to learning. In working on the emotional dimensions of relationship to foster learning,[20] the teacher can seek to develop approval, threat and demand as motivational influences. He may encourage and reward increments in learning through his measured approval or disapproval of student performance. He may dramatize events and experience in order to reinforce learning penetration. He may purposefully or inadvertently offer himself as model for both the character and quality of learning interest and the method of inquiry. The intellectual dimensions of learning can be developed and cultivated through the astute interpositioning of rhetorical and communication forms, strategically located next to the student's motivation and understanding and the kind of material he must learn. At critical moments in the learning situation the teacher may choose between giving information, offering clarification, asking questions, demanding clarification, suggesting or inquiring about alternatives, developing closure and integration, reflecting on implications, and other similar rhetorical devices.[21] With the strategic use and placement of these devices, he stimulates emotional and intellectual responses that foster learning. Clumsy or insensitive usage of rhetorical devices, on the other hand, can fail to induce learning or may even inhibit the learning process.

---

[19] The evaluation and cultivation of teaching is an important aspect of the teaching-learning process. Research in teaching is an integral part of inquiry in educational psychology. See, particularly, Handbook of Research on Teaching, N. L. Gage, editor (1963), a project of the American Educational Research Association. Part II, pp. 142-447, concerns itself with the measurement of teaching skills and success. Part III, pp. 448-813, focuses on such variables as the analysis and investigation of teaching methods, teacher personality factors, classroom interaction, instruments and media of instruction, and so forth. Though the bulk of inquiry and writing concerns itself with education from the pre-school and elementary through the undergraduate years, the available materials are suggestive and offer helpful guidelines generally.

Substantive materials are to learning as ingredients and supplies are to cooking. We have so far been discoursing on how to cook. We have said something about the gustatory result we seek but little about the food to be digested. Law, as subject matter, is theory and information about many things. It has structural and functional components that need to be identified and assimilated within a framework of formal knowledge and practical utility. This means distributing substantive materials in terms of a cohering framework. Excessive chaos is avoided if subject matter in law is ordered in terms that afford discriminative identification, possess syntactical relation and show logical progression. Materials need to be organized in terms of units of instruction whose size and relation facilitate learning and comprehension. There are also modes of representation and instructional economies that facilitate assimilation and skill development.[22] Subject matter materials clearly have to be defined, sequenced, organized, related and ultimately learned in some manner.[23]

---

[20] *Cf*. note 18, above.

[21] The refined analysis of classroom communication processes between teacher and student affords an interesting possibility for studying attitude development and learning processes. By focusing on lingual and other patterns of expressive behavior in both teacher and student(s) one can observe the processes of change, insight, blocking or resistance, and other relevant phenomena occurring. This is analagous to the kind of inquiry into some psychotherapeutic processes pioneered by the Rogerian or "client-centered" school of counseling and psychotherapy. Their objective was to determine the effectiveness of their counseling work. See, for example, Porter, *An Introduction To Therapeutic Counseling* 180-81 (1950), Rogers and Dymond, *Psychotherapy and Personality Change: Coordinated Research Studies in the Client-Centered Approach* (1954), and see Snyder, *Group Report of a Program of Research in Psychotherapy* (1953). Snyder, in analyzing counselor behavior, uses such analytical categories as: restatement of content, giving information, clarification of feeling, reassurance, interpretation, disapproval and criticism, and so forth.

There are also important psychological conditions attending substantive materials that affect the character of learning and the learning experience. They should strongly influence the arrangement of substantive teaching materials. Substantive materials offer greater learning possibility if somehow they can be converted or transposed so as to offer some personal meaning for the student. The need reflects the student's disposition to experience, and meaningful abstraction is best of all a result from experience. An approximation of personal meaning is achieved if the student can relate a social result or consequence to his learning, if not a personal consequence. In effect, the need is to select and arrange subject matter materials for their relevance to the student as well as for their relevance to some intellectual or institutional design.

---

[22] Bruner, one of our foremost educational theorists, observes that "a theory of instruction must specify the ways in which a body of knowledge should be structured so that it can be most readily grasped by the learner...the merit of a structure depends upon its power for simplifying information, for generating new propositions, and for increasing the manipulability of a body of knowledge." See Bruner, *op. cit. supra* note 13 at p. 41. Bruner also refers to the structure and form of knowledge in terms of modes of representation (actions, conceptual images and sets of symbolic or logical governing propositions), economy (the amount of information to be absorbed and processed in order to achieve comprehension), and power (the generative effects of learning). *Id.* at pp. 44-48.

[23] Bruner notes the importance of sequentially organizing learning materials and determining reinforcement needs. See Bruner, *op. cit. supra* note 13, pp. 49-53. Learning is more effective if the elements of coherence, continuity and progression are carefully matriculated into the substantive and procedural aspects of the learning program. The form, pacing and degree of reinforcement need to be carefully evaluated so that inadequate learning or excessive learning (learning waste) do not occur. The organization of instruction is a matter of style as well as substance. The choice and use of language, of perceptual emphases in printing and other presentation, of dramatic means and of various teaching aids are relevant variables.

"Learnability" requires that subject matter material conform to properties of logic and intellect. This means that form, sequence and organization are important in each of the complexes of material to be observed. Subject matter material also needs to serve motivational or directional experience. This emphasizes the importance of relevance and consequence. There are the dimensions and the devices by which the student can identify and understand what is to be learned. He needs "learning handles" to aid him in the exercise of his motivational dispositions and logical capacities, and thereby produce a meaningful and effective learning result. He more readily and skillfully perceives relationships, analyzes connections, orders results and transfers elements of learning if he can see or already appreciates substance and importance in the materials he is dealing with. Without these conditions and this experience learning may not take place or it may prove to be short-lived or decorative. There may be little continuity or lasting incentive to the individual to continue the learning process in life.

B. The Educative Elements.[24]

The dimensions and characteristics of the teaching and learning process are one matter. The substantive emphases in legal education are another. The essentials of a thorough legal education encompass several reasonably discrete elements.

1. Informational. Practitioners' law . . is a pragmatic enterprise. It is concerned with problem definition and solution. It implements various means of fact-finding. The educative element here concerns itself with the adequacy of problem definition, the effectiveness of fact finding and the reliability of facts, and the relevance of problem

---

[24] The formulation and categorization of the functional view is essentially that of Professor Strong. See note 1, above.

solution.[25] It operates in overlapping social, legal and personal universes so that choice of means and solution are not always clear or acceptable Completeness and viability are important information characteristics. Problem relevance and fact validity are other desiderata.

A problem of business organization may have its locus in the intent and personal needs of the organizers and owners, in the ordinances and practices that govern operation and in the laws and procedures that relate to financing. The problem entertains many levels of definition. The facts are psychological, economic and legal, and may require different researching (fact-finding) approaches. The problem solution needs to "fit" a personal, economic and legal universe. This is the informational theatre in which teacher and student interact within the law school universe.

2. Theoretical and Doctrinal. Traditional law and legal education are doctrinal. That is, they are concerned with the expatiation of legal theory and doctrine. The

---

25. Cavers has sought to identify the problem-oriented approach in legal matters and to develop problem-oriented instruction in legal education. See Cavers, "In Advocacy of the Problem Method," 43 Col. L. Rev. 449 (1943). Note, however, that the case method is, operationally, problem-oriented. It is an "empirical method of studying and teaching practice law." See Professor Redlich, quoted in Conant, Two Modes of Thought, p. 53 (1964). The problem approach is advocated by Friedman and Macauley in dealing with matters of contract. They seek to orient substantive contract law and contract teaching away from "traditional contracts" to "pressing problems of business law and behavior." See Friedman and Macauley, "Contract Law and Contract Teaching: Past, Present and Future," 1967 Wisconsin L. Rev. 805 (1967). See also Speidel, "Some Reflections Upon Commercial Context and the Judicial Process." Id. at p. 822.

Fact development does not appear to be a well-conceptualized and highly developed operation in legal education. There is a need to differentiate qualities of facts. For example, some may be discrete and others may be conditional. Some may be simple and one-dimensional in their character and references; others may be complex and multi-dimensional. Facts may have different qualities of observability and verifiability. They may be used in different ways in different universes. Some, some or all of the time, are indicative; others, some or all of the time, are discrete. There is some smattering of fact interpretation but no attempt to develop a systematic framework of fact-finding. See Frank, Courts on Trial, pp. 14-36 and passim (1950); Brown, "The Case of the Relived Facts," 48 Calif. L. Rev. 448 (1960), and Probert and Brown, "Theories and Practices in the Legal Profession," 19 U. Fla. L. Rev. 447, 466-68 (1966).

The surpassing model to determine the "relevance of problem solution" is offered in the colossal and widely noted formulations of Lasswell and McDougal. See Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 203 (1943). Their framework places great emphasis on informational inquiry and it is offered in the context of legal learning experience. Also, cf. Friedman and Macauley, above.

doctrinal focus is critical since the operations of law ostensibly follow the prescriptions and definitions of legal doctrine. Pervasive legal concepts may be involved or doctrine may attach to particular subject matter. *Res judicata*, for example, is an essential doctrine in juridical law that may or must be related to a wide range of holdings. *Res ipsa loquitur*, on the other hand, is a vital doctrine whose character and use is significant to a single problem and area in tort law. Doctrinal analysis and synthesis has historically been the core of legal education. It is doctrinal law applied to current legal cases that has sustained much of the vitality and continuity of law's rational framework.

The theoretical and doctrinal element is broader than the scope of legal theorizing. It also encompasses, or should encompass, physical, psychological, economic or political theory in a manner that is calculated to relate law in its proper perspective and give it effective meaning. A law barring certain criminal conduct can only have viability and a healthy social significance if it is consistent with the best psychological theories regarding behavior. Legal theories about causation in airplane accidents can have probity only if they respect the physical properties and theories regarding the operation and flight of airplanes. Some adequate conception, or at least an awareness that there are pertinent psychological, physical, economic or other theories relating to conduct or an event, is necessary. Substance, relevance and completeness need to be recognized and respected in relation to non-legal as well as legal theory.[26]

---

[26] Theory may be thought of as the perspective within which events and experience may be understood. Theories are different in the way in which they seek to order thoughts and knowledge, and they are different in the purposes which they serve. Theories may be broad or limited in scope and reflect differing degrees of abstraction from real events. They may be rigorous in their references to known information or they may be heavily larded with various speculative devices and constructs. Some theories are predictive in purpose; others seek to explain experience; still others serve the purpose of classification. Disrespect for theory is likely to encourage and reflect arbitrary or erroneous interpretations of experience. Skimming theory, or presenting and learning fragments, is a doubtful approach. It encourages the opprobrium contained in the shop-worn phrase that "a little knowledge is a dangerous thing." Reich notes that law schools have essentially failed when they have sought to utilize non-legal materials. He says "where modern casebooks have attempted to introduce materials from other disciplines, they have done so at a level that is so elementary and piecemeal that it has little value. Casebook social science usually consists of truncated excerpts from secondary sources, inserted into the notes in small type. Even where a law school offers courses dealing expressly with the social sciences and taught by experts in the field, the courses may turn out to be elementary at best." Reich, "Toward the Humanistic Study of Law," 74 *Yale L.J.* 1402, 1403 (1965).

(continued to next page)

Doctrinal necessity, an important formulation of Professor Strong's, lays focus on the ordering and meaning of doctrine to the events with which it is involved. In some instances, particular doctrine may be mandatory, and there are other instances in which doctrine may be discretionary. Legal education is concerned with the development of discriminative abilities so that doctrine may be clearly understood and put to appropriate use. Sagacity and imagination are cultivated in the process of sharpening skills relating to the doctrinal element.

3. *Transactional*. The business of law usually takes place in the element of a transaction between parties.[27] It is a transaction that may occur within the context of legal

---

Lasswell and McDougal, *op. cit. supra* note 25 (p.204), say that "Heroic, but random efforts to integrate "law" and "the other social sciences" fail through lack of clarity about *what* is being integrated, and *how* and *for what purpose*." The problem is to capture the *essence* of theoretical formulations and methods of inquiry in different disciplines or fields of knowledge. Theory and methods, however diverse within the field, likely conform to some structural framework that helps to translate how different fundamental problems are handled. For instance, with reference to psychoanalysis and its many theoretical and methodological variants, Rapaport has shown that there is a basic topographical model that accounts behavior in terms of different levels, an economic model that in effect shows how energy is distributed (in terms of coping behavior and defense systems), and a genetic model that shows behavior in terms of its developmental modalities. He also identifies the structure of theory in terms of an organizational element (a gestalt), a dynamic element fed by drives and psychic energy, and a relational element that is socially determined and adaptive to reality. See Rapaport, "The Structure of Psychoanalytic Theory," 2 *Psychological Issues* (Monograph 6) (1960). A fundamental framework for the comparative understanding of what goes on in a field and how it expresses itself provides a basis for effective intelligence about and use of that field. As Bruner has put it, "To learn structure is to learn how things are related.....The teaching and learning of structure, rather than simply the mastery of facts and techniques, is at the center of the classic problem of transfer." Bruner, *op. cit. supra* note 11 at pp. 7, 12.

[27] The transactional emphasis underlies the interest currently being expressed in clinical education in law and in lawyering operations. Transactions may be personal, involving the psychological and behavioral elements of face-to-face communication. They may be impersonal and discretely or additionally concerned with the employment of facts, concepts and language. Transaction is a complicated phenomenon involving parties engaged in roles, forming relationships and dealing with needs, desires and expectations. This phenomenon of legal experience has just begun to enjoin the interests of some legal educators. L. M. Brown has been a leader in identifying the law office and its operations as a neglected source of legal education. See Brown, "The Law Office - A Preventive Law Laboratory," 104 *U. Pa. L. Rev.* 940 (1956). The transactional aspects of legal and especially lawyering work are identified and considered in some detail in Probert and Brown, *op. cit. supra*, note 18. See also Probert, "Law and Persuasion: The Language Behavior of Lawyers," 108 *U. Pa. L. Rev.* 35 (1959) and Watson's probing clinical observations, *op. cit. supra*, note 4 and in Watson, "Professionalizing the Lawyer's Role As Counselor: Risk-Taking for Rewards," 1 *Law and the Social Order* 17 (1969). And see Redmount, "Attorney Personalities and Some Psychological Aspects of Legal Consultation, 109 *U. Pa. L. Rev.* 972, 982-85 and *passim* (1961). *Cf.* Freeman, *Casebook on Legal Counseling* (1964), and the theoretical formulation of legal counseling, including the transactional element, in Redmount, "A Humanistic View of Legal Counseling," 2 *Conn. Law Rev.* 98 (1969).

(continued to next page)

institutions, such as the courts, or in principally non-legal settings such as the legal department of an industrial corporation. The attorney-client relation sets up one transaction in which the skills of ministering to needs and counseling clients may be involved. Emotional, rational and policy elements, involving law and other considerations, make effective legal counseling a highly sophisticated process. The litigation process is another kind of legal transaction in which advocacy and forensic skills are critical. Here, the law trained person must comprehend the process of trial in legal and behavioral terms if he is to be effective in it.

Transaction also occurs in the relation between one attorney and another. There are, in addition, collegial relations between an attorney and court, and between the attorney and his profession. These may involve concepts of responsibility and the propriety of behavior in the practice of law. Concepts of role and function, and methods of relation, also concern the attorney when he sits on a commission to revise zoning regulations, or when he is an officer in a corporate body, or when he functions as a member of a board of education. Through transaction the attorney makes law viable in legal institutions and other settings. Transactions are a likely occurrence when the attorney is engaged in planning, organizing, policy-making, problem-solving and similar activities.

4. Applicational. The applicational element involves the cultivation of certain patterns of skills. The principal skills are those of dialectics, implementation and

---

Cf., also, Brown, Syllabus and Tape Recording of the Lawyer-Client Consultation, California Continuing Education of the Bar (1970). Here Brown presents critical emphases in a lawyer-client interview and offers a critique for each critical emphasis.

The transactional element in the litigation process is subjected to a discursive analysis by a famous critic, Jerome Frank. See Frank, op. cit. supra note 25. Frank was a pioneer in the advocacy of clinical training in law. See Frank, "Why Not A Clinical Lawyer-School," 81 U. Pa. L. Rev. 907 (1933) and Frank, "A Plea for Lawyer Schools," 56 Yale L. J. 1303-44 (1947). A pungent view of the transactional process in litigation, more from the point of view of advocacy than scholarship, is to be found in Goldstein, Trial Techniques (1935; revised into amendable loose leaf form in 1969 by Goldstein and Lane). Cf. Redmount, "Psychological Discontinuities in the Litigation Process," 1959 Duke L. J. 571 (1959).

advocacy. The dialectical skills are fundamentally Aristotelian logical applications.[28] They involve analysis and synthesis and, through these operations, the ultimate diagnosis and solution of problems that are rationally-structured and legal in character. Dialectical skills sharpen ideas and crystallize facts so that a plantiff's rights, a defendant's liability, a law's compass and a society's privileges may be more clearly determined and fostered.

The implementational skills are those of a practical nature required in developing and processing the elements of a case.[29] They include interviewing, observing and note-taking, researching, briefing and drafting. The style and substance of a brief as an instrument of persuasion, and the drawing of a contract as an instrument of understanding and definition, are examples of the high degree of refinement required in the effective execution of a lawyer's assignment. Interviewing skills, for another instance, may make all the difference between the skillful and sensitive handling of a client's problem and a more peremptory result.[30]

---

[28] Note, however, that the applications of logic may be so singular and distinctive to a given field that they may be identified with that field. Thus, it is correct to speak of "legal logic" as distinguished from formal logic. The use of logic in law has been skillfully dissected by Levi, *An Introduction to Legal Reasoning* (1948). The dialectical process in law has been more recently analyzed by Bodenheimer, "A Neglected Theory of Legal Reasoning," 21 J. Leg. Ed. 373 (1969). See also Perelman, *The Idea of Justice and the Problem of Argument* (Petrie trans.) (1963). An article on relational logic and the law addressed to the legal community by philosopher Dewey a half century ago is still relevant and instructive. See Dewey, "Logical Method and the Law," 10 *Cornell L. Q.* (1924).

[29] The leading formulation and development of implementational skills for use in law and for learning in legal education is presented by Rutter, "A Jurisprudence of Lawyers' Operations," 13 *J. Leg. Ed*. 301 (1961). Rutter expands and elaborates his ideas in broader curricular terms in a later article. Rutter, "Designing and Teaching the First-Degree Law Curriculum," 37 *U. Cin. L. Rev*. 93 (1968).

[30] On interviewing techniques and skills generally, see Kahn and Cannell, *The Dynamics of Interviewing: Theory, Technique and Cases* (1959). For a novel application and analysis of legal interviewing technique, one that is well suited to pedagogical purposes, see Brown (1970), *op. cit. supra* note 27.

The advocacy skills are the applications of rhetoric, logic and emotion suited to the persuasion offered in counseling, negotiation or litigation.[31] Styles and emphasis may differ in, for instance, negotiation[32] as distinguished from litigation. Skill in rhetoric may be critical in litigation but emotional sensing may be of surpassing importance in an effective counseling process.

The applicational element is 'detail' activity, but of a sort that determines the quality of execution and the ultimate merit in law work.

5. Valuational. Law is valuational in so far as it helps to define and then to serve social objectives. If the objective has to do with power, law helps to define the legitimacy and limits of authority, and proprieties in the exercise of power. It is valuational when it determines and invokes constitutional safeguards against self-incrimination or passes judgment on a statute violator. If the matters are economic, law is valuational when it sets and enforces standards for economic concentration or when its doctrines affect knowledge that a litigant is insured in the context of an economic claim. Well-being is another cardinal value defined and supported by law. The declaration and enforcement of standards in domestic relations matters is a principal example. The protection of rights to personality integrity is another example. The symbiotic relationship between law and justice establishes in law the primary responsibility for justice in human conduct. There can be no greater sense in which law is valuational.

The valuational element also has parochial meaning in relation to the operations of law. It defines and regulates the character of legal conduct through such means as codifying ethical standards for lawyers and judges, and regulating transactions in trial procedures. It may pass judgment on actions taken in relation to the propriety of conduct in ethical matters in other social institutions. It defines permissible conduct and, in so doing, may set the limits between professional service and the pursuit of personal gain. It is an espousal system that recognizes and respects moral sensibilities in the ordering of life events.

---

[31] Cf. generally references in note 27, above.

[32] The practical psychology involved in the negotiation process is presented in highly readable form in Nierenberg, The Art of Negotiating (1968).

The valuational element in law may be difficult and complex. There is a principal need to distinguish the 'is' and the 'ought.' The methods of inquiry and judgment relating to valuation and value conflicts, as well as the character of the values themselves, are a proper subject for legal education.[33]

6. Functional. The perception of law as functional in society is what we mean here.[34] Against a framework of societal needs, functions and operations, law is a form of social engineering. Its place is important in the promulgation of political rights and powers in space. Through zoning laws it helps to define residential practices, and through anti-trust laws it may determine economic conduct. It may establish patterns of social and political relations in the way it regards age, sex, race and other personal characteristics. Law, in its prescriptive function, engineers patterns of human relations and organization.

---

33. There are means values and end values. There may also be an order of value preferences and value conflicts. The valuational process is concerned with the clarification of objectives, the choice of means to negotiate ends, and the processes by which conflict and complication are to be resolved in terms of some discrete direction or objective. The fullest treatment of these matters is offered in Lasswell and McDougal's preeminent model for this functional element in law and legal education. See Lasswell and McDougal, op. cit. supra note 25.

34. Leading legal educators from Dean Pound and his "theory of social interests" to the current time have recognized the importance of this educative element in law. Dean Griswold of Harvard has said "If there is anything that a law school education should do it is to develop the attitude of public responsibility in the young lawyer." Griswold, "Report of the National Law School Conference on Legal Education" (Forward) 1 J. Leg. Ed. 67 (1949). Dean Rostow of Yale, in a statement prior to becoming dean, is more explicit. "It is no longer enough, as in the time of Gray or Ames, to rely on haphazard and impressionistic individual notions about the social policy of law. Law must be studied and taught as part of the social process, with fully informed appreciation of the factors which should influence judgment on the choice between one rule, one statute, one form of regulation and another." Rostow, "The Study of Economics in Relation to Education in Law," 2 J. Leg. Ed. 335, 336 (1956). Donnelly, late professor of criminal law, frames the functional issue in policy-oriented terms, after the manner of Lasswell and McDougal. "One of the great contemporary challenges to law schools is to develop lawyers who have the competence to infer the implications of science and technology and assess the social consequences. One of the great challenges to the law itself is the articulation of values and the formulation of controls for their protection." Donnelly, "Some Comments Upon the Law and Behavioral Science Program at Yale," 12 J. Leg. Ed. 83, 90 (1950). The functional emphasis is the spur for relevant legal research in conjunction with the program of legal education. This point of view is espoused and notably practiced by a distinguished legal educator, Hurst. Hurst says, "The bedrock of our legal order is the proposition that legal order is not an end in itself; law justifies itself only as it serves the fuller life of the whole people. This proposition, if no other, would require that legal research reach beyond the immediate data of the legal system." Hurst, "Research Responsibilities of University Law Schools, 10 J. Leg. Ed. 147 (1957). Cf. Friedman and Macauley, op. cit. supra note 25.

Law is also corrective legal process and offers forms and means for conflict resolution. It is the principal means for dealing with criminality. The symbol and the reality of the criminal trial are a highly visible sign of the function of law in society. Adversary procedures, bargaining talents and conciliation efforts are other forms of legal representation available to resolve conflicts and disagreement. Law's correction and human conscience work hand-in-hand to produce orderly patterns of behavior in society.[35]

Law is, thirdly, standard and directive. Prescriptive and corrective functions are combined in an attachment to legal regulation. Laws and standards are drafted, legislated, implemented and enforced. The process is complex and continuous. The design and use of standards involves simultaneously historical views and continuity, social needs and consistencies, and the studied intellectual or rational means to produce clarity and harmony.

We may conclude this section with the observation that, as good law is a necessary function in society, thorough legal education is a necessary function in law.

II. The Experiential Process in Law Teaching-Learning

A. THE TEACHER-STUDENT RELATIONSHIP

Thinking and learning are operations of human beings. The prevalent tendency is to focus on the operations and neglect the "human element." The interaction between the teacher and student, reflecting both substantive and procedural characteristics, is the medium for learning. The substantive elements in the interaction have to do with the character of law and the subject matter being taught. We propose here to focus on the procedural element since it may either facilitate, impede or block learning.

1. The Political Model of Teacher-Student Interaction. Teacher and student together constitute a relationship with definitive characteristics. One dimension of this

---

[35] One is reminded here of the point of view of another distinguished legal educator, Llewellyn. Llewellyn, in his primer for legal education, The Bramble Bush, (1930), says "What (law) officials do about disputes is, to my mind, the law itself." P. 12 (in 1960 reissue).

relationship is political in nature.[36] The teacher in style, method and personal disposition may be quite authoritarian. He leaves little to student discretion or initiative as he defines the parameters of the learning situation. He decides what is to be studied, how it is to be studied and what he expects and demands as an outcome. He defines the limits of behavior and decides on the kind and extent of the interaction he will have with his students. He may be fortified in his approach by administrative regulation and perhaps some common sentiment among colleagues reflecting general beliefs and practices in the relation between teacher and student. The political structure generated by the teacher is authoritarian. Its virtue is the stress on discipline and conformity. It intimates that proper learning occurs when students conform to teacher-prescribed expectations and acquire the skills of personal and mental discipline on which the learning system insists. The most congenial pedagogical forms for this kind of political interaction are the lecture method, recitation strongly guided and directed by the teacher, formal examination of students by teachers, teacher-defined research projects, and the like. The limitation in the political and pedagogical approach may be the restriction to a narrow choice of values and interests circumscribed by the teacher's attitudinal preferences and intellectual limits. Conformity may be at the expense of a greater imagination, resourcefulness and self-reliance. Innovation is an unlikely product.

---

[36] Savoy, *op. cit. supra*, note 18, sees clearly some of the political and psychological implications of the teacher-student relationship. Though he may tend to overgeneralize in the following statement his point is well-taken. "The classroom is not just a place where teachers and students meet periodically. It is a complex social and political structure. In so far as the learning experience of a student occurs in a class, his learning is a function of a process of social interaction and is defined in part by the power to determine the shape and content of the learning experience of group members and how that power is exercised. In his interaction with the professor and other members of the class, the student will learn more about power, authority, justice, democratic living, freedom, aggression and intimacy than he will absorb from all the cases and books that he will read in his three years of law school. The *process* of education, then, is more important than its content; what you *do* in your classroom is more important than what you say. In short, the educational medium is the real teaching message." Pp. 480-81. See also Savoy's discussion of autocratic class structure, *id*. at pp. 482-83.

A near psychological classic is the studies of different political approaches in children's educational experience. These were conducted by "gestalt" and "group process" oriented psychologists at the University of Iowa in the 1930's. See the report by Lippitt, "An Experimental Study of the Effect of Democratic and Authoritarian Group Atmosphere," 16 *U. Iowa Stud. Child Welf*. No. 3 (1940). See also Anderson, "Learning in Discussions: Resumé of the Authoritarian-Democratic Studies," 29 *Harv. Educ. Rev*. 201 (1959). Anderson concluded that "political" differences in group process (given the goals, procedures and child population utilized) produced no significant differences in learning and no significant differences in liking for different subject matter. There is an implication here, affording a hypothesis to be tested with law students, that the "intrinsic" motivation of some or many students is more critical to learning than the educational methods applied to them.

An alternative conceptual model for teacher-student interaction, in political terms, is democratic. Goals and means may be less rigorously defined, at least by the teacher. There is a greater experimental and permissive quality and the teaching approach may be less structured. The personal relationship between teacher and student may be more casual, in substance as well as appearance, and the teacher may practice more of an "open door" policy on matters of student interest, need and concern. The democratic as distinguished from the laissez-faire quality of instruction derives from the implicit expectation that student motivation and momentum will at least help to determine the direction, the involvement and the methods in law learning.[37] There is some sharing in goals and means to the greater benefit of the student, perhaps the teacher, and there may be contribution to the intellectual discipline. The pedagogical modes likely to be associated with this teaching-learning framework include greater emphasis on research and independent study, problem simulation and more emphasis on clinical experience, and small group, seminar-style discussions. An appealing virtue may lie in the egalitariarism of the process but the achievement benefit may be in the greater incentive to inquiry and productivity and in the disposition to seek newer or better solutions to problems. Liability may incur if motivations and interests are either narrow or shallow and do not provide for an adequate range of experience or good discipline in some

---

37. Berlyne, an educational psychologist, states, "whether or not learning will occur and, if so, how effective it will be depend not merely on conjunctions of events but also on the psychophysiological state of the learner, and especially on what we call his "motivational condition"....."it helps if there is some correspondence between the motivational condition of the learner (what he wants at the moment) and what he is being given an opportunity to learn." Berlyne, "Curiosity and Education" in Learning and the Educational Process pp. 67, 68, 69 (J. D. Krumboltz, editor) (1965). McKeachie, a leading educational psychologist, identifies motivation as one of the learning principles relevant to teaching methods. The others are: organization, variability, verbalization, feedback, contiguity and active learning. McKeachie, "Research on Teaching at the College and University Level," in Handbook of Research in Teaching 1118, op. cit. supra note 19. See also Bruner, op. cit. supra note 26, on "desire to learn." See also notes 14 and 15, above.

essential skills. The unenthusiastic, lax teacher and the poorly motivated or undisciplined student may combine to produce a professional incompetent, especially in the democratic model of teacher-learning.

Student attitude and conduct is a reciprocal or contesting factor in the teacher-student political process. The more passive student, given more to absorption than exploration and principally concerned with meeting essential requirements, responds best to the authoritarian model. On the other hand, he may be relatively unproductive and may show limited initiative in the pedagogical programs under the democratic model. The more challenging and inquisitive student may be frustrated by an authoritarian teacher and excessive structure and requirement in his learning program. If his initiative and creativity are not to be stifled he may resist and rebel in the authoritarian mold, risking negative judgments of his competence and value. The more curious and enterprising student likely functions well in a more democratic teaching-learning setting that tends to tolerate and reward his initiative.[38]

2. The Psychological Interaction Between Teacher and Student. The teacher-student interaction is also a psychological relationship. In the learning context two psychological phenomena may have particular bearing: the operation of aggression and the occurrence and effect of anxiety. The endemic relationship between a dialectical teaching approach and the expression of aggression has some important implications for learning.[39] The disputatious

---

[38] A formulation by the social philosopher, Mead, may be germane here. He distinguished those who were "capable of establishing their own relational coherence" from those who are incapable of such behavior. A mechanical organism is one that may be defined in terms of other organisms, "a participant in and dependent upon a process occurring outside itself." In the more purposive kind of functionning, the organism participates in and constitutes its environment as a part of its striving for meaning. See Mead, The Philosophy of the Act, p. 301 (1938).

[39] On this point see, especially, Watson, op. cit. supra note 18 (1968) at pp. 101-05 and 128-37. See also Redmount, op. cit. supra note 2 at p. 206 and cf. Watson, op. cit. supra note 18 (1963) at pp. 18-20. The aggressive game-playing aspects of the Socratic and dialectical methods in the classroom are described by Savoy, op. cit. supra note 18 at pp. 457-60. In conjunction with this account see Berne, Games People Play (1964). Dean Pound quotes from Hegel's Phenomenology in a memorable passage on unscholarly aggressions of scholars. "Hegel said that what scholars of a certain type really mean by devotion to reality and objective method in dealing with their subject is that "they are fond of displaying their wits to one another and of showing their paces and winning applause, and with a touch of the old savagery about them are also fond of expressing contempt for the failures of other men." " Pound, "Some Comments on Law Teachers and Law Teaching," 3 J. Leg. Ed. 519, 520 (1951).

search for truth may be a screen for personal aggression that, in the learning context, intimidates or "turns off" students. It can be a demeaning process that creates a model for the kind of lawyer who lacks in sensitive and humanistic qualities. On the other hand, it is a flexing and testing process for those with a markedly aggressive bent and those who consider that the lawyer ought to be a fighter in both style and substance.

Anxiety is both a stimulant and a deterrent to learning.[40] Anxiety attaches to motivation where there are standards and requirements to be met, as in work stipulations and examination. A modicum of anxiety in the student reinforces the need to perform and is useful. On the other hand, an excess of anxiety, whether from personal or pedagogical sources, shatters confidence, incites fear and may inhibit or prevent performance. Excessive threat of failure, fortified by pressures of competition that may be too intense and by inordinate demands or standards of performance, breaks down self-assurance and other strengths essential to learning.

Since learning is substantially influenced by psychological interaction, the quality of interaction affects motivation and the character of learning. A remote or disinterested teacher does not spark enthusiasm or respond to the learning enthusiasms of students. He may dampen interest, at least in subject areas where he may be a principal resource and stimulant for learning. Contraiwise, a personally more engaging and accessible person, using enthusiasm and involvement as an instrument, can generate and sustain inquiry and interest in students. A caveat may be observed in the teacher who generates interest and enthusiasm but only in areas or matters that are of interest to him. If he tend to circumscribe student interest so as to meet his particular needs and theses, his indoctrination serves some but repels others with a freer disposition about learning.

The process of professional identification is an important matter to be noted in pedagogy. In the vernacular of youth, students are "turned on" and "turned off" by different teachers. Teachers are at least tentative models for professional behavior and intellectual habits.[41] The disputatious teacher encourages disputatious students. The emotionally sensitive teacher encourages emotionally sensitive students. A reciprocal relation may also exist between teacher personality and behavior and the character of students. The emotionally supportive or notably tolerant teacher may generally encourage learning by his attitude. He may also, for the same reason, attract the less able students. The taskmaster may draw more competitive students, but he encourages a hostile idiom.

---

[40] See note 17, above.

Distinctions in teaching approach, with concomitant psychological and learning implications, may also be observed in terms of different intellectual emphases. A "concept-oriented" approach in teaching emphasizes intellectual substances in legal matters. A "value-oriented" approach stresses goals and purposes and puts legal learning in some context. A "transactional" emphasis stresses the dimensions of human needs and interactions in legal matters. The teacher's particular stress or bias about law learning affects student interest and response, and may affect subsequent professional emphasis.[42]

Models for psychological relationships are a subject matter yet to be developed in legal education. The combination of personal attributes and dispositions, of both teacher and student, that make for the best individual learning is a proper subject for inquiry. This, the size of learning groups, the style of operation and similar personal and interaction characteristics are at least filtering agents through which substantive learning can take place. They may even be the determinants of effective learning.

---

[41] See Watson, op. cit. supra note 18 (1968) at pp. 103-05. See also Bruner, op. cit. supra note 11, at p. 91. Bruner refers to the teacher as "commentator, model and identification figure." The importance of the teacher as mediator is described by a distinguished classicist, Professor William Arrowsmith. He says, somewhat eloquently, "The teacher, like his text, is the mediator between past and present, present and future, and he matters because there is no human mediator but him. He is the student's only evidence outside the text that a great humanity exists; upon his impersonation both his text and his student's human fate depend. For student and teacher alike, ripeness is all. The age of the student does not matter.

Men, not programs; galvanizers, not conductors. When students say that their education is irrelevant, they mean above all the absence of this man. Without him the whole enterprise is ashes, sheer phoniness. This is why students are so quick, and so right, to suspect a fatal hypocrisy in the teacher who lives without the slightest relation to what he knows, whose texts are wholly divorced from his life, from human life." Arrowsmith, "The Future of Teaching," in Campus 1980: The Shape of the Future in American Higher Education (A.C. Eurich, ed.)(1968).

[42] The learning and behavioral effects on law students of teacher motivation and teaching methods have been the focus of observation by Peairs. See Peairs, "Essay on the Teaching of Law," 12 J. Leg. Ed. 323 (1960). See also Watson, op. cit. supra, note 18 (1968), pp. 109-14, and see Redmount, op. cit. supra, note 18.

B. THE STUDENT

The capacities, dispositions and experience of the student define the limits of his learning possibilities and the emphases that may occur within him. This may be reduced to an appreciation of the learning process in terms of each student's thinking and feeling processes.

1. Characteristics of Thinking Processes.[43] At the level of law school learning, the student's cognitive processes are engaged in the practice of conception, connection and recollection.[44] Conception involves first the definition of a problem and one or more goals.[45] Conception is aided by context, so that the student can identify and classify a problem in some universe. A case involving a man who claims to be cheated by his building contractor involves questions of fraud and, in turn, questions of contract. It may also involve issues of business and technical practices in the building contracting field. It brings into issue matters of remedy and relief, and possibly matters of prevention and protection. Conception defines the kind of behavior, the kind of problem and the kind of universe that, taken together, focus the subject of study.

---

[43] Cf., generally, notes 7 through 11, above.

[44] The scientific philosopher, Whitehead, in referring to the "rhythm of education," also notes three stages of cognitive experience but he describes these differently for his more general expositional purpose. "The stage of romance is the stage of first apprehension. The subject matter has the vividness of novelty; it holds within itself unexplored connexions with possibilities half-disclosed by glimpses and half-concealed by the wealth of material.....The stage of precision also represents an addition to knowledge. In this stage, width of relationship is subordinated to exactness of formulation.....The final stage of generalization is Hegel's synthesis. It is a return to romanticism with added advantage of classified ideas and relevant techniques." Whitehead, The Aims of Education and Other Essays, pp. 28, 29, 30 (1929).

[45] Dewey, in one of his educational classics, How to Think (1910), notes that thinking begins with a "felt difficulty" which commonly takes the form of conflict "between conditions at hand and the desired or intended result, between an end and the means of reaching it," P. 75.

Conception in terms of law also involves a strong historical dimension. That is, the problem of a case will be identified in terms of relevant and perhaps supporting or competing theory and doctrine drawn from other prior cases and from one or more legal sources.

The conceptualization process, if it is thoroughly encouraged, involves identification, classification and inductive inquiry into immediate factual, social and historical references. It teaches how to define problems and set them up for investigation. If the element of problem conceptualization is reduced or slighted, it may become only a matter of registering informational material and the cognitive elements are not exercised. Or, only delimited inquiry, such as inductive inquiry serving to identify the range or choice of relevant legal doctrine, may occur.

Connection involves the building of a hierarchy of inferences (relations) through discriminative associations and dissociations, and the testing of alternatives.[46] The process forms the correct or most direct logical or empirical relation or solution available to the matter under inquiry. Through this process the student learns techniques and knowledge that will later economize his mental operations and give him more mental power in dealing with problems. He will learn to combine certain patterns of analysis and to denote concepts and ideas. He can learn to transfer learning and analogize from one problem situation to another that may be alike in critical ways.[47] He develops a "short-hand" of symbolic representation, concepts, methods and doctrines that enable him to deal clearly and rapidly, and probingly, with a range of problems.

[46] See, especially, notes 7 and 11, above.

[47] "Transfer of learning" is a fundamental conception in learning theory. Transfer of learning is the transfer of identical elements or specific skills, though there may be other elements, such as attitudes, involved in transfer as well. It involves the learning of a connective structure between characteristics of events and ideas. Quoting Bruner, op. cit. supra note 26, "To learn structure is to learn how things are related." Skills of conception and memory are involved in transfer of learning. The more useful and economic learning permits of learning transfer. Logical refinement is required to determine that the learning transfer is indeed accurate and properly utilized. Weihofen some years ago noted the relevance of the conception for legal education. Observing that "we cannot know how to teach unless we know how students learn," Weihofen proceeded to a discussion of transfer of learning and educational economy in legal education, among other learning variables. See Weihofen, "Education for Teachers," 43 Col. L. Rev. 424, 435-39 (1943).

Perhaps a representation of the connective process would be helpful. At the level of conceptual analysis a matter of marital disharmony presents itself. The issue may be focused as a question or problem of divorce in the legal universe, a matter of personal well-being of the parties and parties affected in a psychological universe, a matter of distributing economic obligations and responsibilities in a socio-economic universe, a question of public policy and political control in a political universe, and so forth. From such conception problem variables, issues and objectives may be defined. Connection at the first level of inference may involve associating, combining and dissociating fact variables (experience, speculation, opinion and observation) in order to provide a cohering pattern or patterns of factual data. At the next level of inference data may be associated with a tentative choice of theory. The fact picture may be connected to a theory of divorce and its supportive requirements. The same or other facts may be associated or tested in relation to theories of economic production, distribution or consumption. Connection may involve facts of marital disharmony and their relation to public order, protection of children or similar public policy matters. The utility and appropriateness of theories may be tested by the analysis of implications or perhaps by empirical inquiry. At another or perhaps a parallel level of inference, other theories or constructs of possible relevance may be introduced and logically or empirically connected. Marital reconciliation and psychotherapeutic solution, concepts of individual rights and personal obligation, tax implications, conceptual alternatives to marriage, and others, may be considered and empirically, analytically or speculatively explored. Ultimately, in the hierarchy of inferences and connections, formulations are tested and developed. The final levels of inference may involve the development or deduction of solutions, representing synthesis and the last stage in means-end testing. Facts and their supporting theories may be fitted to solutions of divorce at a personal and legal level, redistribution of tax obligations at an economic level, new legislation affecting requirements for divorce and protection of children at another legal and policy level, and so forth. In the process of connective inquiry the student learns concepts germane to different types of theory, practices close logical analysis, may develop some tools for empirical inquiry, learns to use intellectual initiative and imagination, and acquires other habits and tools such as semantic analysis and value judging that are his mark and those of his field.[48]

Recollection here means the process by which awareness and skills may be stored and retrieved.[49] Certain fact or conceptual principles may be learned, separately or in combination, and skills may be developed that can be quickly and economically transferred and used in more than one problem situation. The analysis of a domestic relation may involve facts of a psychological nature, concepts of fault or skills of analytical investigation that may be pertinent to a criminal matter, a tort matter or a matter of economic concentration and regulation. Reinforcement in learning, or the need to repeat kinds of learning experience, wholly or in part, directly or indirectly, also bears on recollection.[50] Reinforcement may be insufficient to permit effective recollection or it may be excessive and a waste and a bore in learning experience. The characteristics of memory also reflect directly on recollection. Learning experience that has been clear, vivid, meaningful, of symbolic significance and consequential in some way to the student, entertains a better prospect of being stored in memory and accessible to retrieval.

Cognitive learning is rarely the complete, efficient and thorough process that is

---

48. Gagné, a learning theorist, observes that there is a sequence of objectives in the cognitive (or here, more specifically, the connective) process. He notes that the process moves from (1) a simple connection to (2) a chain or sequence to (3) identification to (4) a concept to (5) a principle to (6) higher order principles. Some of the steps are subordinate to others some or all of the time. See Gagné, "Educational Objectives and Human Performance," in Learning and the Educational Process, op. cit. supra note 37 at pp. 18-19.

49. Recollection, as the term is here utilized, is a dynamic process. Dewey, in fact, goes a step beyond in his discussion of the climactic phase in learning and education. He thinks of learning not as residual but as instrumental and continually changing and modifying the experience of the individual and the impact on his environment. The idea of education.... is the "idea of continuous reconstruction of experience." While all thinking results in knowledge, ultimately the value of knowledge is subordinate to its use in thinking. For we live not in a settled and finished world but in one which is going on, and where our main task is prospective, and where retrospect - and all knowledge as distinct from thought is retrospect - is of value in the solidity, security and fertility it affords our dealings with the future." Dewey, op. cit. supra note 4 at pp. 93, 177-78.

50. "Reinforcement" is a conceptual cornerstone in learning theory. In lay terms it is more familiarly identified with the now classical formulations of the learning theorist, Thorndike, on the "law of effect." Thorndike postulated the effects of reward in different forms and of punishment on learning, concluding ultimately that learning is governed by the law of effect. Cf., note 16, above, and related text.

optimally or theoretically possible. There are neglects and interferences.[51] The learning of various cognitive processes and methods may be limited by the biases and necessities of instruction. The empirical mode of inquiry, or the development of factual material in which to give problems alternative conceptual or definitional frames, may be neglected. There may be too much of an alliterative process in law learning so that methods of analysis and inquiry sound too much alike and there is little real sequence and development in the composition of learning.[52] There may be excessive reinforcement of the process of associating analyzing and classifying legal doctrine, and learning may take on the character of drill rather than conception, connection and recollection.

At the personal level of student experience, the pace at which each student may learn and integrate particular cognitive processes may vary.[53] Some may be quicker and seemingly more intuitive. Some have better memories. Some need more reinforcement of certain or several processes than do others. The student who is more guarded in his psychological experience, and prefers intellectual experience, may find the connective processes in cognitive learning more congenial than the development of problem possibilities in a live, experiential universe. He may also be more inclined to explore dimensions of legal doctrine than consideration of psychological analysis or public policy development. The student with a more sanguine approach to life may see more ramifications to a divorce problem than one whose range of personal experience and interest is more limited or remote. Motivation, experience and sheer capability or ease in learning will significantly influence whether a particular student finds inquiry of a certain kind or in a certain area harmonizing and rewarding to his ways of thinking and modes of experiencing. The consequence of a lack of harmony and satisfaction may be a seeming cognitive inability to grasp, negotiate or retain well. In effect, there may be a block or a limitation in cognitive skills and application because of limited or negative interest, meaning, involvement or consequence for the student.

---

[51] See note 9, above.

[52] Sequence is a vitally important concept both in individual learning and in curriculum planning. Sequence in teaching and learning should be governed by such considerations as curiosity, speed of learning, degree of recall, relevance and transferability of prior learning, power of previous learning to generate new hypotheses, the form and content of the next or newer stage in learning, and so forth. Much yet needs to be learned and known about sequential operations in cognitive learning. An instance will be cited out of context to demonstrate the importance of sequence in learning. Rothkopf, an educational theorist, studied problems of sequence in written instruction. He varied sequence and the placement of various elements in written English stories and then evaluated comprehension and learning. He observed that immediate repetition of a fact, even when phrasing was varied, produced less learning than delayed repetition but more generalization to a prior context of information. Rothkopf, "Some Theoretical and Experimental Approaches to Problems in Written Instruction," in Learning and the Educational Process, op. cit. supra note 37 at p. 193. The proper sequential arrangement of interest and involvement, fact and theory, learning skill and prior information is an important element in learning. Bruner notes the problem as one of the principal elements in an effective theory of instruction. See Bruner, op. cit. supra note 23.

[53] See Bruner, op. cit. supra note 13, at pp. 42-44 and 50-53.

Another way to indicate restriction in cognitive learning is to recognize that differences in subject matter affect differences in learning possibility. Subject matter, meaning the issues, values or methods involved in learning, may be too difficult or complex to comprehend. It may lack relevance for the experience of the student, perhaps because of its remoteness to personal experience or because its full meanings and ramifications have not been developed effectively. It may be associated with unhappy learning experiences, such as prior failure or disenchantment, so that a negative disposition to learning exists.

2. Characteristics of Feeling Processes.[54] The energy of learning is provided by basically emotional processes. Its use and direction is mostly a matter of personal motivation.[55] Motivation is, in a sense, the need, the urge and the interest to learn, to achieve or to gratify. It is a consequence of frustration as, for example, where a student has experienced social discrimination and consciously or unconsciously thinks of law as a means of acquiring intellectual and political power and affecting change. It may be the development of curiosity and the student may be interested in the ideological framework and the means for solving economic problems. Motivation sets up a kind of coping behavior, whether this is coping (perhaps, more accurately, defending) to solve personal problems, or coping to change social priorities or to develop personal skills and mastery.

[54] See, generally, notes 12 through 15, above.

[55] See note 14, 15 and 37, above.

Motivation takes on direction as a consequence of the structuring of personal experiences. It is fortified by anxiety and by the personal capacities of inquisitiveness and imagination. A student for whom a quantum of experience is that his father is a lawyer may develop an interest in and empathy for the operations and functions of law. His intellectual acuity and imagination reinforce his interest and enlarge his capability for dealing with matters as he proceeds in learning. Motivation is reinforced because he feels rewarded. A different example would involve the student whose anxiety and perhaps anger are generated by experiences of injustice by authority, whether this be parental authority or the restrictive authority of social custom and tradition. Anxiety and anger are a driving force that may create or reinforce the disposition to learn. Learning becomes a means to future corrective, adjustive or even rebellious action, and the tools and skills associated with law may be the medium.

Learning without some kind of personal motivation is a matter of indoctrination from without or uncongenial and forced rote exercise of mental capacities from within.[56]

---

[56] Note the observation by Reich that law learning in current curricular designs becomes tedium. He says, "Students cannot find courses they want to take. Having caught on to the classroom method, they drowse through increasingly obvious repetitions. They try to find new interest outside the classroom in legal aid, practice trials or law journal work. All too often law school ends with students merely marking time. Reich, op. cit. supra note 26 at p. 1402. See also Savoy, op. cit. supra note 18 at pp. 444-45.

A major lack is the failure to nurture motivation and gear its development to the development of learning. It is more than possible, and quite likely, that the early emphasis on narrow cognitive learning in legal education quickly satisfies or easily thwarts learning motivation. The student learns the basic dialectical approach and doctrinal skills and applies these to basic areas of law. There is nothing visibly left for him in the formal legal education process. Alternatively, if learning were geared to his feeling, interest and experience, he might seek to develop skills relating to fact and theory, and enlarge his awareness of problems and issues, in a more natural, varied and personally meaningful progression. The proposition, of course, applies particularly to bright and capable individuals, and it is from this spectrum that law students are drawn. As Dewey observes, "Especially is th educator exposed to the temptation to conceive his task in terms of the pupil's ability to appropriate and reproduce the subject matter in set statements, irrespective of its organization into his activities as a developing social member." Dewey, op. cit. supra note 4 at p. 227. Gardner, in his oft-quoted and well-received book on Excellence (1961), says (the schools and colleges) "must equip the individual for a never-ending process of learning; they must gird his mind and spirit for the constant reshaping and reexamination of himself. They cannot content themselves with the time-honored process of stuffing students like sausages or even the possibly more acceptable process of training them like seals. It is the sacred obligation of the schools and colleges to instill in their students the attitudes toward growth and learning and creativity which will in turn shape the society." p. 143.

The lack of motivation affects receptivity to learning, the degree of initiative and imagination the student will or will not show, and the limits of his retention and recollective facility. Ultimately, the lack of motivation for law problem solving or law learning may result in the disuse of trained legal skills and sensitivities or in the pandering of these skills and sensitivities for any, including unconscionable, purpose. In most instances, the lack of learning motivation will be reflected as one cause of student drop-out or learning failure.

Empathy is a quality of emotional experience that affects the intensity and sensitivity of the student's involvement in learning and other matters.[57] The empathic quality and empathizing facility express emotional bonds the student may feel toward another person, a

---

57. "Empathy" is a term of relationship between a person and someone or something else. It is germane in all human relations and particularly important in intimate associations. Rogers, whose humanist emphasis in his theoretical formulation of the psychotherapeutic process is notable, defines empathy as one person "assuming, in so far as he is able, the internal frame of reference of the [other person], to perceive the world as the [other person] sees it, to perceive the [other person] himself as he is seen by himself, to lay aside all perceptions from the external frame of reference while doing so, and to communicate something of this empathic understanding to the [other person]." The ability to empathize may be another way of saying that one person is capable of taking the role of the other, an essential aspect of all interpersonal communication." Rogers, *Client-Centered Therapy* pp. 29, 348 (1951). An "empathy" for people and causes may be observed in a distinguished work on living problems and social problems by Lewis, *The Children of Sanchez* (1961). There are numerous other instances that distinguish "warm" and engaging from "cold" and repelling attitudes and feelings affecting learning and other human relations operations.

The currently popular concept of "sensitivity" is substantially related to "empathy." Both concepts involve a broader awareness, especially an emotional awareness, of experience though empathy may suggest more emotional commitment. Shaffer is one notable law teacher who has sought to incorporate sensitivity and, implicitly, some empathy in both his teaching methods and his formulations of attorney procedure in the area of testation and estate planning. Much of Shaffer's work in this direction is as yet unpublished but see Shaffer, "Will Interviews, Young Family Clients and the Psychology of Testation," 44 *Notre Dame Lawyer* 345 (1968), and *cf*. Shaffer, "The Psychology of Testation," 108 *Trusts and Estates* 11 (1969). Levy, a teacher of family law, also works the sensitivity and empathy-producing experience into his pedagogical framework. He describes this experience in Levy, "The Family Law Project at the University of Minnesota Law School" in *Human Relations in Law #3* (1969), an occasional newsletter privately distributed to interested law teachers by Professor Richard Boardman of The Catholic University School of Law.

"Preventive law," a concept developed and fostered especially by Brown, implicitly involves notions of empathy and sensitivity in relation to client needs and human problems. See Brown, *op. cit. supra* note 27 and Brown, "Experimental Preventive Law Courses," 18 *J. Leg. Ed.* 212 (1965).

cause or a consequence. Mostly, this is derived from prior experience that consciously and mostly unconsciously sets up emotional connections of pleasure, concern, shared need and similar binding experience. A student may empathize with a teacher. That is to say, he may like him, perhaps strongly, and this facilitates learning. A student may sense the sharing of a need with a client who has been deprived of certain rights. This empathy may induce him more strongly to learn and to probe so that he can be or become more helpful. A student may feel anxiety or sorrow because of the questionnable humanistic effects of certain social policies. This empathy and consequent drive to seek change provides a basis for more intense and more involved law inquiry.

The approximate emotional opposite of empathy is indifference or a lack of involvement.[58] Indifference in a student is a basis for more mechanical mental operation. The incentive to inquiry may be lacking, and there may be a lack of sufficient concern for valuational processes. In effect, a lack of interest, concern and feeling reduces the capacity of the individual to feel, understand and effectively resolve problems. It is, to a degree, a form of isolation from the universe in which one works and lives even as one mechanically negotiates some aspects of these practices.[59] The lack of empathy and the lack of motivation are, of course, closely related. The lack of feeling and the lack of drive both contribute to mechanical or negligible learning experience.

Resistance is a highly relevant emotional phenomenon that may keenly affect personal learning.[60] Resistance expresses fear or dislike and takes the form of avoidant or oppositional behavior. This may be shown in relation to a person, an idea, a way of experiencing, a particular set of values or other matter. A student may avoid or resist some learning because he is fearful, lacks confidence and does not want to be exposed or exploited. A student's dislike for a teacher may take the form of resistance to the latter's ideas. A distaste for a particular value emphasis, such as the psychological, may result in the avoidance of problems and solutions in terms of their psychological dimensions. The restriction of student role, and the use or abuse of personality in learning, may set up resistance to teaching methods and to the teacher's patterns of conduct and assumption of role.[61] Resistance may be obvious and easy to interpret. It may also be more subtle and unconscious so that certain lacks, voids or failures in learning may not be clearly identifiable in terms of resistance. Resistance, based on some unpleasant connections in the student's mind and feelings, sets up and reflects mental and emotional blocks to learning. The identification and modification of resistance, whether it exists on a mental or emotional basis, is an important element in the teaching-learning process.

---

[58] Cf. notes 14, 15 and 37, above.

[59] In this connection, see Watson's comments about problems of avoiding or omitting human contact in law and legal education. Watson, op. cit. supra note 18 (1963), p. 12 and (1968), p. 111. See also Redmount, op. cit. supra note 2 at pp. 203,205.

[60] "Resistance" is a prominent phenomenon to be accounted and dealt with in the experience of psychotherapy. Psychotherapy is, in many respects, an analagous learning experience to formal education. "Resistance" and "blocking," as has been noted, may be unconscious and outside of the scope of deliberate intention or, in some senses, it may be conscious and deliberate. Resistance as a phenomenon and concept is discussed in a highly readable treatise by Fromm-Reichmann, Principles of Intensive Psychotherapy pp. 109-20 (1950).

C. THE TEACHER

The teacher is also an entity in the teaching-learning experience to be identified in terms of his thinking and feeling processes. He also has underlying capacities, dispositions and experience that affect what he teaches and the way he teaches.[62] And, in addition, he has or develops "delivery techniques" that reflect his method and style in presentation and persuasion.

1. Teacher Thinking and Feeling Processes. Cognitive emphases of the teacher will reflect the strengths and weaknesses of his own learning and related experience and the dispositions and skills that are most comfortable or meaningful for him. Some teachers are better than others in the conceptualizing and problem defining process. There may be more latitude in their thinking and ideas so that they can encompass different kinds of behavior

---

[61] See notes 36 and 39, above.

[62] Cf. Watson, op. cit. supra note 13 (1968) at pp. 109-14 and Peairs, op. cit. supra, note 42, passim.

or issues, or different universes. Other teachers with narrower learning and experience may be comfortable in conceptualizing a problem only in terms of its legal referents. Fact inquiry may be limited and legal doctrine accentuated in order to arrive only at a more parochial legal solution to problems.

Some teachers operate better with and prefer deductive and analogic processes in a principally intellectual universe. Others may go beyond this in their connective processes. They may be able to use inductive inquiry more effectively and this may include some inquisitiveness and skill in methods of empirical investigation.

A teacher whose particular learning skills and experience have been reinforced by subsequent personal and professional experience likely will reflect this emphasis in his subsequent recollective ability. If he has worked professionally with problems of criminality, or conveyancing, he likely will be able to draw more on problems, concepts and methods in these matters in as much as they have been reinforced and made more immediate, vivid and meaningful for him. Transfer of learning for him is the transfer of cognitive and emotional experiencing from criminality or conveyancing to other law-related problems.

The motivational dispositions of the teacher are a principal structuring characteristic of his teaching methods and aims. If his conscious concern and value stress lies with the reforming of civil procedure, or trial procedure generally, his teaching will reflect his value biases and stress the methods and insights that have to do with reforming law. If he is of a more conservative bent his motivation and comfort may involve stressing stability and continuity in law and other relations. His teaching of the law of contracts or property law may stress problem presentation, analytical constructs and legal solutions that shows law and legal operations to be dependable and consistent and a unity in experience.

The motivations of a teacher for teaching are also of focal concern. His interest in teaching may be peripheral to his interest in research or in public service.[63] A proper concern with teaching methods and aims may be neglected as the teacher's energies are involved elsewhere. Worse, he may bring his peripheral interests into the classroom to an excessive degree. Students, willing and interested or not, may be pressed into the service of the teacher's research or public service interest under the guise of learning experience to be given proper learning credit. The quality of teaching motivation may also shift or change in time and a shift or loss of interest may occur. Teaching may become more mechanical and attitudes may become more cynical.

---

[63] Cheatham observed that, "We law teachers are slow to grant and act on two facts. The first is that we are teachers. We will gladly admit that we are lawyers, social scientists, scholars, jurists, philosophers - all of these. But teachers - hardly that! The second fact is that teaching, like other professional work, is itself worthy of study in the universities, the more so since it is a major activity of the universities." Cheatham, "A Seminar in Legal Education," 1 *J. Leg. Ed.* 439 (1949). See also Watson, *op. cit supra* note 18 (1968) at pp. 106-07 and 111-13.

Covert and unconscious motivations may also affect teaching skills and dispositions. A teacher with a strong aggressive bent may enjoy dialectics in the classroom whether or not this is relevant and effective learning procedure in a particular subject matter context.[64] A teacher with a strong need for dominance may relish and exercise his position of authority in the classroom excessively.[65] This may make for insensitive response to student needs, feelings and attitudes that are a crucial part of the student's learning dispositions and even his capabilities.

The quality of empathy and the empathizing ability of the teacher will strongly affect his teaching success. Some teachers may relate to students better than others, and some may take a greater interest in students than others. Some teachers may identify more strongly with the subject matter they teach, and may empathize more with the problems involved or with possible solutions to be taken. They may tend to show more involvement and concern and perhaps more inquisitiveness and imagination. The more remote, unaffected or disinterested teacher, such as one who prefers to live in his ivory tower or prefers extracurricular roles, offers the student little emotional support or personal enthusiasm to aid in the process of learning.

Resistance, whether to a student because of certain personal qualities or to a subject matter because of its personally alien and unlikeable character, creates teaching

[64] See note 39.

[65] See note 36.

as well as learning blocks. The refusal of involvement or acceptance by a teacher because of resistance is tantamount to a void in the learning possibilities for a student. Resistance, like empathy, provides the emotional association that may either hinder or advance particular learning and the teaching-learning process.

2. Techniques of Teaching Delivery. Teacher delivery may be characteristic of the teacher in his teaching, or it may be distinctive and adapted to his subject matter. It may be both. The techniques of teaching delivery may be comprehended in terms of two vital aspects of teaching, presentation and persuasion.

Presentation[66] may be informative, open and direct. That is, the teacher may present all essentials or identify the sources from which all essentials may be acquired. He presents a problem completely and unambiguously. He identifies all sources of information, and he states the conclusion or outcome in problem-solving or learning that may be expected. In this presentation method, learning is thought to be a highly orderly process and the emphasis is on the connective more than the conceptualizing element in cognitive learning. The style of delivery suited to direct presentation is mostly declarative. It is a "feeding" approach for the student and the lecture form or highly structured recitation may be facilitating. It is possible, though not clear, that some law subject matter may be more conducive and more appropriate to this method and style of presentation.

Alternatively, presentation may be more incomplete, ambiguous and perhaps deliberately concealing in some degree. The intent of the teacher is to have the student exercise his abilities to find and define the problem. This teaching and inquiry method may be carried through to the connective stages and to some aspects of recollection in the cognitive process. The teacher likely will provide some essential characteristics of the problem and the problem-solving process but the student must search the means to carry solutions and learning further. This is likely subject to guidance and correction by the teacher. This presentation method assumes that learning is an inquisitive process characterized more by the inherent existence of order in the learning process. It also presumes more about student background, motivation and capability. The presumption may or may not hold as regards different subject matter and the student's relation to or interest in that subject matter. The style of delivery in indirect presentation is likely to be more provocative and the student must cope more. The teacher may be, or perhaps ought to be, more inclined to use the seminar or informal recitation form here. There may be greater emphasis on the procedure of independent study and research approaches may be stressed, especially if there are ample teaching and research resources and a manageable student body size.

---

[66] Ausubel infers something about choice of presentation methods in his distinction between "reception" and "discovery" in learning. Applying the concepts to the general process of learning, he states that emphasis on reception is more appropriate early in learning and that discovery is more appropriate afterwards. See Ausubel, op. cit. supra note 9 at pp. 22-2 Followers of the Montessori school of learning would heartily disagree. Cf. Dewey, op. cit. supra note 56 and Mead, op. cit. supra note 38.

Presentation may also be totally unstructured or, even more correctly, non-existent.[67] The subject-matter and problem-orientation may be defined entirely by student need and motivation. The character and extent of the teacher's presentation is directly related to individual student requirements. The presumption here is that meaningful and effective learning may not require any element of formal presentation. The style of delivery here is informal conference and selective discussion or seminar with the teacher functionning more as observer and advisor than traditional pedagog. The student is solicitive and his needing defines the character and perhaps the order of learning. This presentation method and style presumes resourcefulness and requires capability in the student along with a high degree of motivation. The teacher's role is more restrained but the student must compensate with his energy and great involvement in learning. These attributes may be more characteristic of some students than others. Some law subject matter may lend itself to the elimination of any formal presentation. Other subject matter of a more specific and esoteric nature may require presentation in some form and degree as a basis for meaningful inquiry free of excessive waste in energy and misapplication. The prior preparation and

---

67. This is akin to the so -called counselor "non-directive" and, more completely, client "inner-directed" method espoused by Rogers as an approach to client problems in psychotherapy. See Rogers, *op. cit. supra* note 57. It has been utilized as an experimental teaching form in classrooms and, in some instances, has been adopted as an appropriate teaching method. See Asch, "Nondirective Teaching in Psychology," 65 *Psychol. Monogr.* No. 4 (1951). Its merit is that it capitalizes on student motivation to "draw the student out" more and involve him in his learning. Its more general limitations as a teaching method are noted in the text, above.

learning experience of a student may determine the law subject matter areas in which he is most likely to succeed without teaching presentation.

Techniques of persuasion may also be related to teaching-learning objectives but they probably are more indicative of the personal idiom of the teacher. As a means and style of persuasion, the teacher likely will engage in particular conceptual structuring, semantic operations and dramatic techniques.

The teacher may structure conception in various ways in order to offer persuasive appeal. He may select and tailor subject matter that has human interest, i.e., he may present an issue of contract as a matter of sexual understanding, neglect or violation. He may justapose different problem situations or differing conceptual and connective issues in a way that is provocative and challenging. He may suggest solutions to problems, or a choice of solution, that may appeal to different value interest and stimulate efforts to achieve the desired result. The teacher's persuasion may be an effort to stimulate learning interest and response to a given subject matter.[68] It may go further and be intended to influence the direction of the student's cognitive efforts and the direction of his emotional commitment as to some issue or matter.

The teacher's semantic operations, reflecting the importance of language analysis in law,[69] may be geared to alert, surprise or incite the student. The close relation between language analysis and problem solution in some matters of law makes semantic operation the vehicle for problem definition and comprehension leading to effective solution. Semantic

---

68. It has been observed that Harper's Problems of the Family (first edition, 1952) is well-saturated with sex-related, non-legal materials as an inducement for the student to take an interest in the subject matter. The risk is that the sex stimulus becomes the focal interest and law is only the remainder. There is limited scholarship value in a stimulus to learning that is too personal, intrusive or intensive.

69. Semantics and the analysis of language usage as law learning subject matter have had a persistent advocate in Probert. He has written a number of articles on semantics in different dimensions of law experience. See particularly Probert, "Why Not Teach 'Semantics' in Law School?" 10 J. Leg. Ed. 208 (1957). Here he describes an experimental effort to employ semantic analysis in the law classroom. See also Probert, op. cit. supra note 9 and Probert, "The Psycho-Semantics of the Judicial Process," 34 Temple L.Q. 235 (1961). The subject goes to the development, function and usage of language as meaning. It goes beyond the more usual legal analysis of language in statutory construction or judicial opinion analysis. See, generally, on the subject, Brown, Words and Things (1958) and Morris, Signs, Language and Behavior (1946).

operations may be presented in highly emotional and logical forms, such as in dialectics or doctrinaire teaching, so that the student may be caught up more in the emotional than in the logical elements of the semantic approach. Another risk, in a highly verbal profession, is that the symbolism, meanings and uses of language - the semantic operations - are given such prominence that problems may be obscured and problem analysis made too narrow.

Semantic choice may be one aspect of the dramatic technique employed by a teacher. Consciously or not, the teacher dramatizes in order to influence. His dramatization may even characterize him as an actor, and the risk here is that the student will be more responsive to the acting style than to the substance that the teacher delivers. Because of dramatic flair and doctrinaire rigidities, some teachers may be identified as eccentric, egocentric or prima donna in character. Such focus on the teacher may produce a negative charge for learning. Dramatic technique may involve choice of subject matter, choice and style of language, physical appearance and methods of physical presentation, and an adroit use of setting and circumstances in order to generate more awareness or appeal. Dramatic technique may include the use of students to stimulate involvement or to set up simulated experience in order to make problems or issues more meaningful and personal. The dramatically effective teacher does not stress drama so that personality and sensation predominate over intellectual content and rational inquiry. Neither does he neglect or lose sight of dramatic means and necessity as a way of stimulating learning interest and emphasizing some learning content.

D. THE TEACHING-LEARNING METHODOLOGY

The context in which subject-matter ought to be considered in legal education is first learning and then law. That is, principles and insights relating to how students learn should influence the teaching approach and characteristics of subject matter more than systems and procedures that govern the operation of law itself. The student is not taught law. He learns how to think about and work with characteristics of law and matters relating to it.[70]

---

[70] *Cf.* law teaching aims defined by leading scholars and educators in note 34, above.

1. Principles in Learning: Motivation, Sequence, Reinforcement and Transfer.[71]

There are a few governing principles that help to establish the characteristics of law teaching and subject matter for learning purposes. Learning is achieved through first the motivation and then the capacity of the student. Motivation is the vehicle that provides drive, inquisitiveness and persistence.[72] Capacity provides, in part at least, the means, rate and quality of understanding.[73] Subject matter, then, must first seem to be or must become important and relevant to the student. This can be achieved if the student can feel himself to be a part of the law experience. One means is the simulation of legal problems from the perspectives of clients, citizens, lawyers, judges and so forth.[74] Another is to provide an intimate or relevant experiential context in which the law issues are operative.[75] For example, matters of bankruptcy can be more intimately understood and made more relevant if the student can "feel" like a prospective bankrupt and face the factual and legal issues with which the bankrupt must deal. The student's inhering motivations and interests may provide the primary thrust that leads him to inquire and learn more about, for instance, the law of contracts or of community property.

---

[71] *Cf*., generally, notes 14, 16, 37, 47, 50 and 52, above.

[72] See notes 14 and 15, above.

[73] See note 6, above.

[74] "Role-playing" is a familiar educative device in the behavioral sciences and in other learning contexts such as management training. The role-player adopts with more or less fidelity the outlook, concerns and stereotypic behavior of the party or entity he represents. With this as a framework to set party dispositions, the perception and cognition of problems, and thinking methods, can be more readily understood and imitated. The role-player may then participate in the simulation of a problem-situation. Learning proceeds from an experiential framework that samples and tests thinking and feeling styles and concerns itself with live or life-like problems.

"Role" is the subject of a major concentration of inquiry in sociology. See Biddle and Thomas, *Role Theory: Concepts and Research* (1966). *Cf*. Strauss, *Mirrors and Masks* (1958). "Role-playing" is the outgrowth of the psychotherapeutic theories of J. L. Moreno. See Moreno, *Psychodrama* (1946). See also *Psychodrama and Sociodrama in American Education* (R. B. Haas, editor) (1949). The techniques of role-playing and its possibility for general educational and mostly pre-college classroom use are presented in *Fostering Mental Health in Our Schools*, published by the Association for Supervision and Curriculum Development, N.E.A., c. 16 (1950). In the context of legal education, the educative devices of student appellate competition and moot court involve role-playing. See also Brown and Bonanno, "Interscholastic Mock Law Office Competition - A Description and an Invitation," 15 *Student Lawyer Journal* 24 (1970). *Cf*. Shaffer, *op. cit. supra* note 57. For an example of simulation in relation to legal counseling see Brown (1970), *op. cit. supra* note 27, above.

In effect, a sequence[76] develops in which the student moves from experience to generalization and, most probably, from fact to law. The sequence is sustained by motivation and goes through an evolutionary cycle or progression. Generally, one goes from the simple to the complex, from the concrete to the abstract, and from observation to analysis to synthesis. Sequence implies direction and it avoids stagnation and ineffectual repetition. The sequence is geared to the need and disposition to learn and must consider the rate at which different learning takes place. It is dependent on the effectiveness of prior learning and resulting thinking. With this as structure, sequence may be framed in terms of *some* repetition of the experience-to-reason-to-solution process in order to amplify the range and variation in the subject matter. Some subject matter may be repeated in order to demonstrate and practice the different means of analysis and synthesis essential to a problem.

This now brings into consideration issues of reinforcement in learning.[77] Some

---

75. This is the familiar concern with clinical experience that is currently the source of much experiment and debate in legal education. The emphasis in clinical experience, at least to the present, is on providing exposure to living problems to counteract and, essentially, to supplement the "arm-chair" experience of academic learning. The emphasis is also on the development of applied techniques to supplement fundamental learning conception and method. It is "experiencing" and, to some extent, trial-and-error learning. Nonetheless, as Frank observed in comparing casebook learning and learning in a "legal clinic or dispensary," "It is like the difference between kissing a girl and reading a treatise on osculation." Frank, *op. cit. supra* note 25 at p. 234. Leaders in the clinical education movement have become increasingly concerned with the quality and emphasis in the clinical experience. *Cf.*, Sacks, "Remarks on Involvement and Clinical Training," 41 *U. of Colo. Law Rev.* 452 (1969). Using his reflections from observed clinical experience, Sacks concludes that 1. a strong classroom element is essential in clinical learning, 2. excessive time for learning may be spent in clinical projects, 3. adequate supervision of clinical experience is absolutely essential and 4. most forms of clinical experience are expensive. Sacks, *id.* at p. 458. See also Sacks, "Human-Relations Training for Law Students and Lawyers," 11 *J. Leg. Ed.* 316 (1957) and *cf.* notes 27 and 57, above.

76. See note 52, above.

77. See note 50, above and related text.

exposure and practice, and hence reinforcement, is essential in learning. Insufficient reinforcement means insufficient learning and excessive reinforcement is a waste of valuable learning time. Obscure or complicated facts, as in the data relevant to a matter of child custody, may require substantial reinforcement in the processes by which facts are identified, chosen, developed and utilized.[78] Some or many of the principles of fact finding may be demonstrated in domestic relations problems and these may also be shown to apply selectively in finding the facts relating to a breach of contract, an automobile accident and other matters involving law. Complex and diverse theory, as in social and legal theory relating to modern property ownership, uses and practices, may require substantial reinforcement in the development, exercise and relationship of theory.[79] Learning to formulate, analyze and apply theory provides both relevance and experience in other areas of law where theoretical development is the crux of skillful legal application. Relevance, complexity and completeness are the tailoring measures that decide how much fact finding and theoretical development may be useful and necessary in the offering of subject matter for learning. These are considerations that operate in the experience or extension of the motivation and capacity of the learner.

Issues of reinforcement in a legal education program conjoin with the matter of transfer of learning.[80] We have suggested that formulation and practice[81] require reinforcement, and also that learning in one focus or concentration may also apply to another. There may be specific information that a student ought to learn irrespective of its transferrability. For example, he may need to know specifically about the rule against perpetuities if he is dealing with future interests, and he may need to know the substance of various rules of evidence if he is to become skilled in trial procedure. Inherently or because of the mode

---

78. _Cf._, reference to facts and fact-finding in note 25, above.

79. See note 26, above.

80. See note 47, above.

81. Practice is possibly a form of reinforcement but it may simply be a different educative device by which one learns conceptual material and methods. Hence, it complements formulation and conceptual learning but is not, in the more accurate sense of the term, reinforcement of learning.

or emphasis in teaching there may be little transferrability in this learning. On the other hand, there are principles and methods learned in one concentration that may be adaptable to others. Some of this involves a transfer of learning, an important concept if one is concerned about the economy and effectiveness of learning. Principles and methods in traditional legal research and in empirical research are transferrable in various legal subject matter. They require reinforcement in learning but their universality and similarity exists in learning the principles of inquiry and not necessarily in applying them to every important law problem. Reinforcement of learning is a different matter from sheer repetition.

Effective learning is skill in doing. This may involve learning some specifics in content and method, but mostly essential learning seeks the quality of "generalizability." Application then becomes a dynamic and imaginative function rather than a matter of rote memory, mechanical linkage or dull repetition. Subject matter, then, is defined in large part by its qualities for a contribution to a learning program. There needs to be relevance to the student, affecting or utilizing his motivation. There needs to be sequence in learning materials, so that progression and continuity are offered. There needs to be timing and spacing geared to learning capabilities. There needs to be practice and application and this may be part of a reinforcement process. There needs to be both specifity and commonality in content so that both memory and transferrability of learning do occur.

2. The Grouping of Subject Matter and Content Emphases. The grouping of subject matter is likely to follow some basic organizational pattern. This may be historical, reflecting the development of a problem or the development of law from its beginnings. The logic of problem solution and law development is brought out in the phases through which the subject matter passes. The outcome may be a current status report with perspectives for continuing development possibilities. This is a familiar teaching emphasis, notably in some areas of experience such as those relating to commercial transactions and some areas of law such as those relating to constitutional interpretation.

The operational approach affords another organizational possibility. Here, the focus may be on conflicts and social problems. The emphasis is first on empirical approaches needed to amplify the problem and define fact and theory alternatives.[82] The consideration of law becomes an important and sometimes crucial variable in seeking conflict and problem resolution. The development of empirical facts and the application of law are designed to achieve a highly functional result in some experiential context, one in which legal and empirical desiderata work together toward harmonious conflict or problem resolution. Problems of economic and trade regulation may best fit this mold.

Another organizational pattern for law learning content is that grouped around choice of values.[83] Experience is interpreted and law is defined and implemented in terms of certain value preferences. Instances and meanings in behavior are used to invoke patterns of legal control. The choice of law and the effectiveness of law are the subject of inquiry, but always with a view to serving particular value purposes that in turn serve political traditions, public policy or individual well-being. An apt example of such emphasis is the conglomerate that may come under the title of criminal law. Welfare and family law may also be organized around a prevailing value emphasis and developed in these terms.

Subject-matter grouping is a likely determinant of the emphasis to be placed on particular dimensions of learning experience. The historical approach tends to stress the character and uses of theory. Theoretical development and comparative theory become the principal subject around which skills of analysis and synthesis are developed. The operational approach, on the other hand, may place some greater stress on fact development and the correlation of fact and theory. Methods of empirical analysis may or should play a more vital role in conflict and problem solution.[84] The approach that stresses a value or values is likely to be, knowingly or not, strongly policy-oriented. Political principles may be intrusive as facts and law are tailored and measured in terms of their relevance and aptness for the particular value under inquiry.

---

[82] It is perhaps an interesting coincidence that a professor of economics virtually headnotes the introduction of the Journal of Legal Education with his article stressing the operational relationship between economic matters and legal approaches. Professor Edwards, in his advocacy of the study of economics in legal education, says "Economic analysis may lead to a more discerning treatment of evidence, a better understanding of the business maneuvers which underlie legal controversies, more appropriate concepts of monopoly power, and a better understanding of the policy of the law. The most appropriate materials for such analysis are the facts and relationships of the cases themselves, together with whatever studie may be available about the enterprises and practices involved in the cases. Broader studies of the nature of competition and of business policies are also appropriate; but they need to be based upon data, to produce conclusions which can be identified when they present themselves in the data, and to discuss issues and alternatives of current public policy." Edwards, "The Place of Economics in the Course in Trade Regulation," 1 J. Leg. Ed. 1, 11-12 (1948). See also Rostow, op. cit. supra note 34 and cf. Reich, op. cit. supra note 26.

[83] Cf. comment by Donnelly, op. cit. supra note 34, and cf. note 33 and related text.

3. Teaching Techniques, Student Interests and Subject Matter Learning. Teaching techniques[85] vary in their emphasis on presentation or participation, experiential or intellectual analysis, and skill or memorization emphasis. Typically, there is some combination of techniques so as to afford some learning in each of the mentioned alternatives, though the learning may be disproportionate.

The lecture method or, more typically, the lecture and recitation method, focuses on subject matter content. Through its emphasis on presentation, augmented by dialectics that give practice in analysis, the student learns many ramifications and possibilities of a given subject matter. The teaching techniques of lecture-and-recitation and programmed instruction[86] are mostly subject-matter oriented.

---

[84] This brings into focus the issue of "research" in legal education. Langdell, in introducing the case (casebook?) method to law a century ago, made the library the preeminent learning resource. He said, "The library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist." Langdell, quoted in Frank, op. cit. supra note 25 at p. 226. Today, we may advocate that the library with its encouragement to scholastic inquiry should share with the empirical research center and its emphasis an empirical inquiry as the principal resource vehicles for learning of and relating to law. Currie, after developing the history and experience of social science training and incorporation into law teaching observes that "Not only must research facilities be available to individual teachers to be used as the need arises, but there must, of course, be organized and systematic research in law and the sciences directed toward the discovery of new knowledge without referenfe to the law school curriculum. The product will inevitably be reflected in the training of undergraduate law students, as it is incorporated by compilers of teaching materials." Currie, "The Materials of Law Study," (Part III) 8 J. Leg. Ed. 1, 77 (1955). See also Hurst, op. cit. supra note 34.

The empirical research influence contributes to habits and skills in fact inquiry, the analysis of theory and the means of synthesis and conclusion. It also generates attitudes that bear on the learner's awareness and observation of experience, his concern for possibilities and probabilities in experience, and his disposition to exactness, completeness and reasonable objectivity in his work.

[85] Cf. section on THE TEACHER, above, and especially the text relating to Techniques of Teaching Delivery.

Problem simulation,[87] and practice in lawyering techniques[88] such as counseling, negotiation and litigation, are more student-oriented. That is, the student may select the problem or is attuned to the problem in such a way that the development of legal and other ramifications follows from his awareness and interest. He participates and simultaneously develops the elements of human relationship and problem analysis in an effort to become more skill-proficient in his lawyering functions. There tends to be relatively more

[86] "Programmed instruction" or, more correctly, automated teaching presentation is a device that serves the same purpose and uses inherently the same means as the lecture-and-recitation method of teaching. There is presentation and problem declension followed by analytical choices and consequent outcomes or conclusions. The learning process involves the student in identifying problems, using logical discriminants, recognizing his analytical errors, and pointing to and perhaps reinforcing correct methods of solution. The device implicitly relies on the "intrinsic motivation" of the student. This is the kind of motivation in which the student, once into a problem, finds relief, satisfaction and consonance in having the problem defined, analyzed and resolved in the correct manner. In rudimentary learning theory terms, he feels "rewarded" and this both imprints particular learning and is an encouragement to further learning. Programmed instruction may avoid waste stemming from excessive and unproductive classroom dialectics. It may be conformed to the rate of learning that is appropriate and effective for the student. It utilizes a more rigorous emphasis on rational and logical methods and it seeks to avoid emotional diversions that may obscure or misdirect learning. It frames an area of learning content for succinct consideration. On the other hand, programmed instruction omits or defines categorically much that is psychological and transactional in experience, matters that are important both to learning and to law. It encapsulates or abstracts the experience with which it deals to a degree that may encourage unempathic and narrow intellectual response to matters with which the learner deals.

Programmed instruction, in measured dosage, is or can be made applicable to some legal learning. It is most suitable where the learning experience is more intellectual than psychological or relational in character, more logical than intuitive, and where the subject matter lends itself to discrete and confined definition. The theory and most accepted basic technique of programmed instruction are generally of original credit to Skinner, a distinguished learning theorist. See Skinner, "The Science of Learning and the Art of Teaching," 24 Harv. Educ. Rev. 86 (1954) and see Skinner and Holland, "The Use of Teaching Machines in College Instruction," in Teaching Machines and Programmed Learning (A. A. Lumsdaine and R. Glaser, editors), p. 159 (1960). For a readable presentation of issues in programmed instruction, see Programmed Learning: Theory and Research (W. I. Smith and J. W. Moore, editors) (1962).

In the field of legal education, perhaps the most sanguine advocate of "canned learning" is Kelso. See Kelso, "Science and Our Teaching Methods: Harmony or Discord," 13 J. Leg. Ed. 183, 192-95 (1960), and see his instructional guide, Programmed Introduction to the Study of Law (1965). See also Debtke and Wills, "Investigation of the Use of Programmed Material in Legal Education," 15 J. Leg. Ed. 444 (1963).

[87] Cf. note 74, above.

[88] See note 27, above, and cf. note 57, above.

experiential analysis, and law is applied in context. Intellectual analysis is not a principal focus and it may even tend to obscure the importance of experiential awareness for the definition and solution of legal and other problems.

Research emphasis as a teaching technique may take the form of an individual or group[89] research project. This may involve intellectual and/or empirical research. Typically, such teaching is policy oriented and seeks to define alternatives and evaluate solutions for some complicated social problem or policy matter. The emphasis is on participation and analysis but with more concern for formal methodology and less concern for the element of intimate human experiencing.[90] As a teaching technique it, too, is skill-oriented and may cultivate library or larobatory-type research capabilities.

An abstruse subject matter, especially one that requires and develops keen skills in intellectual or logical analysis, may be served best through lecture-and-recitation teaching techniques. If the material to be learned is quite difficult, a nearly tutorial

---

89. The "group approach" or "group process" is a timely and current conception in education. It probably derives from "group" approaches to the learning experiences of personal counseling and psychotherapy. Superficially, it is analagous to the traditional classroom experience, which is also a "group" experience. The emphasis and distinction in the "group approach" is that it encourages conjoint experiencing and thinking. The experience of being subject to and sharing the awarenesses, reactions, ideas and inclinations of others acts as an impetus to expand one's own thoughts and feelings. Involvement and imagination are stimulated as added perspectives and means give better solutions to problems. They key to "group process" is that individual and group thinking and feeling not be impeded by an authoritarian or highly structured leadership or other forms of preemptive participation. The "group leader" seeks to act more as an unobtrusive influence and catalytic agent in stimulating response and creation. "Group research," in this context, draws heavily on the creativity, imagination, concern and persistence of students working mostly in a small ensemble to define, analyze and resolve a problem. They may be aided by a knowledgeable but "group-attuned" teacher. The learning is discovery and sharpens transactional and informational (problem-defining, fact-finding and theory-selecting) elements of education.

One of the most widely noted references on the theory of the group process is Bales, Interaction Process Analysis: A Method for the Study of Groups (1949). See also Hale, Borgatta and Bales, Small Groups: Studies in Social Interaction (rev. ed. 1965), and Cartwright and Zander, Group Dynamics: Research and Theory (3rd ed. 1968). An elementary description of "group dynamics" is presented by Luft, Group Processes: An Introduction to Group Dynamics (1963). See, particularly, Luft's remarks addressed to the teacher and the latter's need to know more about and implement "group processes." Id. at pp. 44-53. For other references to group processes in the formal educational context see note 36, above. See also Haigh and Schmidt, "The Learning of Subject Matter in Teacher-Centered and Group-Centered Classes," 47 J. Educ. Psychol. 295 (1956). Cf. note 74, above.

90. Note that the last conclusion may not be true or as true if the research effort is conjoint and follows the guidelines of "group process." See note 89, above.

approach with students may need to be developed. Subject matter that stresses and requires traditional and historical concepts and emphases in law are most apropos. The law regarding future interests and "old" property law may serve as a best example.

Transactions in which the human relations element is particularly important, and includes problems and conflicts relating to personal frustrations and misunderstanding, may be served best by a problem simulation approach. The student has or acquires sensitivity for the dimensions of personal experience that are involved and he learns to think more in terms of consequences for the parties. Matters of family relations, estate planning and some contractual matters are especially appropriate as vehicles and subjects for a problem simulation approach.

A research emphasis in teaching stresses issues of policy. It may focus on the legal structure of a matter in issue or on the larger empirical character of some complicated social process. The student learns to frame logical or empirical inquiry and he develops analytical and synthesizing skills. Problems of criminal law and regulation and problems of economic control offer character and complexity suited for empirical research. Traditional legal research methods, centering on the library and mostly on rational as distinguished from empirical inquiry, are characteristic of much constitutional law inquiry.

Teaching techniques can and should be measured in terms of their relevance and effectiveness for a particular learning purpose. Some are inherently better suited to student interest or subject matter learning than are others. Th choice of teaching technique is also a matter of the teacher's personal comfort and skill. Some teachers adapt better to the podium and others to the round-table. Optimally, the teacher, his teaching skill and his learning objective, should be effectively mated to one another.

E. EVALUATION AND OUTCOME

The evaluation of learning is the evaluation of competences and attitudes. Explicitly or implicitly, it is an evaluation of the student, the teacher and the learning program. It is a measure of learning in relation to student personality, professional need, social problem solution and cultural intelligence.

Clearly, evaluation governed by such complex criteria cannot or should not be reduced to conceptual feed-back on a conventional bluebook or student examination. It is the educational process that is being evaluated as much as the student. Results and findings tend to reflect on what has been taught, emphasized and neglected, and on what has been unlearned, learned and perhaps overlearned. In more specific terms, a legal education that stresses competency with doctrine and concepts, more or less to the exclusion of other elements, may create a practitioner who is narrow, formalistic and unable to appreciate the complexity of facts or of social problems. A legal education that is badly unbalanced in favor of the technical and neglectful of the intellectual produces lawyers who lack in perspective and in the capacity to adjust and change, though their immediate mechanical skills may be sound. Hypothetically, one could conceivably develop fact-sophisticated attorneys who are skillful in empirical methodologies but, because of curriculum overemphasis, they may fail to know or adequately appreciate the historical and social continuity of and necessity for some traditional legal doctrine. At the level of immediate and personal learning experience, one of the largest risks in unbalanced learning, especially in legal education, is that psychological sensitivities and empathizing skills for dealing with human relations problems are blunted by an early and excessive emphasis on honing logical skills and doctrinal analysis.

1. Criteria for Student Learning. There are, then, a complex of considerations involved in the criteria for student learning. These, in turn, bear on the quality and character of legal education. Evaluation results become a measure of the student and perhaps a guide for him. They are also a reflection, as we have said, on what is adequate and inadequate, or offered and neglected, in his learning program.

Matters of attitude are perhaps most crucial to the kind of law professional the student becomes, or, attitudes may be most strongly indicative of how the student will utilize his law experience and skills. Attitudes may express social value preferences, the degree of commitment to personal inquiry and effort in one's work, tolerances toward social developments and change, dedication to one's professional role and activity, and similar motivating influences. How a student is able or chooses to view, and how he handles or does not handle, a given problem expresses attitudinal preferences, changes and tolerances. Each of these is a measure of his endowment and his learning.

Inasmuch as law learning and subsequent application require searching, identifying, assimilating and retrieving various kinds of information, a measure of information acquisition, retention and retrieval skills is important. This may run a gamut from what kind of information to acquire in a marital disharmony matter and how to acquire it, to how to utilize and correlate law review materials, economic treatises, Corpus Juris and the U. S. Reports.

Problem-solving skills and applications are one of the most critical elements in law learning. Problem-solving involves defining the dimensions of a problem, and knowing how to order and interpret findings and make appropriate conclusions. This may mean knowing how to define, resolve and interpret a problem of legal doctrine choice. It may also mean knowing how to search for or set up an empirical research procedure and arrive at conclusions essential to the appropriate analysis, determination and legislation of an economic control or community development matter.

Emotional dispositions and interpersonal skills are matters of sensitivity and knowledge that affect a student's capability in a wide range of transactions with others. They may also influence his ability and perhaps his bias in selecting facts, perceiving problems and offering solutions to a variety of personal and social matters. Some emotional dispositions may be better suited for trial practice than others. The character of interpersonal competence may tend to make one person a better counselor, another a better board chairman, a third unsuited or ineffectual in working with transactional problems.

Imagination and creativity are perhaps more elusive qualities to identify, define and measure in learning. Nonetheless, some recognition is needed of the importance for a law-trained person to be imaginative and creative. This competence may range from perceiving or constructing different possible ways to win a legal point at trial, to imagining and sketching a program for legal control in space. The qualities of imagination and creativity may be evident in the student's responses within his formal learning experience, or they may come later when social urgency or personal confidence and boldness encourage innovative solutions to problems.

The exercise of professional choice and judgment is a reflection of personal sensitivity and professional knowledge. It is also an indication of personal identification with and dedication to the ideals, goals and practices of the profession. This is not a matter of blind adherence but of reasoned judgment in which professional considerations are weighed with personal and social needs and exigencies. The student's effort to relate and resolve these considerations in some principled and systematic way is an indication of his learning.

Related but broader and somewhat more abstract is the matter of the student's professional involvement, range and quality of intellectual interest and sense of social responsibility. An effective learning process should produce and reflect attitudes of substantial professional and/or social problem involvement, indications of some serious intellectual interest and broad range of inquiry, and selfless, humanistic concern for life experiences and social processes. This verges on an ideal but, clearly, it is not sufficient that a law student become a good mechanic who is principally immersed in the skills and problems of making a lot of money or learning how to win.

2. Processes of Evaluation. Evaluation, properly considered, is a measure or series of measures in time, scope and depth. Evaluation extended in time implies that evidence of skill or success may be shown over a period of time or may develop in time. There may be "late bloomers" as well as "instant prodigies." Post-schooling productiveness and contribution of the student is one measure in time. Clearly, this is assessment of legal education in longer-range and broader-gauge terms. It is relevant to the assessment of a program of learning and is at least retrospective assessment of the student and his personal learning. More immediate, reliable and practical assessment of learning may have to be limited to the interval of law school residence. Here, assessments on the several criteria of learning may be cumulative and progressive rather than immediate and restricted to some delimited course of learning. This would be especially desirable and essential to reliability in the matter of assessing attitudes and attitudinal change. It is important in assessing progress in all the educative elements, giving a measure of rate and increment in learning.

The scope of assessment is a kind of measure especially important in the informational and problem-solving elements of learning. Breadth is required here because of the extensive range of information and problem-solving possibilities, relating to different matters in different contexts, that characterize law. Scope applies to other educational elements as well, as law learning involves an enlargement of skills and perspectives to encompass a diversity of matters. One may become more skilled in a variety of applications and transactions, and one may broaden one's valuational or functional viewpoint, if learning is given sufficient scope. Scope may appear to be implicit in the piece-meal, examination process used to assess learning in such separate course concentration as torts, contracts or decedents' estates. However, it is more likely that it is only or mostly depth in doctrinal analysis that is being evaluated here.

Assessment in depth is perhaps most important in the evaluation of emotional dispositions and interpersonal skills. In these attributes mere appearance and a brief sampling of behavior may afford only very superficial judgment. Similarly, observing what a student says or does in some form of brief examination may not provide a reliable indication of his likely professional attitudes and conduct, and commitment to further growth. Some variety of sampling and observation, giving depth to assessment, is required. Informal as well as formal teacher-student relations afford a basis for more complete and meaningful assessment and judgment.

We may conclude that formal examination or brief assessment are not to be equated with evaluation.[91] This is so whether the purpose is to judge the student or give him sufficient advice and direction concerning his progress. An aggregate of different techniques of evaluation may best serve to assess the student's learning and his learning experience. A fuller consultation may be needed to apprise the student of his progress and of his strengths and weaknesses.[92] The judgments to be utilized may be the group opinion of his teachers and his peers, and perhaps the in depth assessment of teachers and counselors who come to know him particularly well. Opinion may incorporate assessments of relevant attitudes, capabilities and preparation. Besides opinion, demonstrations of competence are needed to fill out the assessment process. This may include some variety of means. Formal examination may be most appropriate where competence in doctrinal skills applied to legal problems is being measured.[93] Role simulation may be useful as an examination medium where transactional skills are being evaluated. A research problem or project may be the appropriate testing medium where informational and applicational skills are sought to be measured. Project choice, design and execution by the student may give some indication of his competency and interest in the functional and valuational elements of his education.

---

[91] One may take note here of Savoy's acerbic comment about the product, and implicitly the purposes and methods, of the law school examining process. He says, "Grades are the effluvia of the dying body of traditional education." Savoy, op. cit. supra note 18 at p. 475.

[92] Kelso deplores the fact that final course examinations are not used more imaginatively and effectively, and in accordance with good principles of learning. See Kelso, op. cit. supra note 86 at pp. 185-86.

Evaluation, as it develops, is more selective and inventive than standard and repetitive. This is important to note, especially if evalution is to be the means to personal and programmatic growth and progress. While some minimal general and repeated standard of performance is essential to law practice, and may be served by bar examination, law school evaluation ought to be a more imaginative, sensitive and comprehensive process. There is much to be learned about teaching-learning, and about approach and substance in law learning.

3. Attitudes of Experimentation and Inquiry into Teaching-Learning and Legal Education. The evaluation process can be a systematic means of research into the legal education program.

---

[93] The style and method of formal examination, with special reference to problems of objective measurement in law school bluebooks, is the subject of an article by Ball. See Ball, "'Objective' Questions in Law Examination," 12 J. Leg. Ed. 567 (1960).

The measurement process is an area of concentrated inquiry and nearly a discrete "field" in psychology. Educational measurement in this context of inquiry tends to be principally concerned with the issues of (1) "criteria" for learning that are to guide measurement and determine its significance and value, (2) the "validity" of examining methods that determines whether the measuring instrument is measuring what it purports to measure, and (3) the "reliability" of measurement that has to do with whether the measurement and its result are consistent and dependable. Critical issues in measurement and the range and kinds of examining methods suitable or developed for different psychological and educational purposes are presented and analyzed in Anastasi, Psychological Testing (3rd edition) (1968). A reference usable by teachers for developing and assessing a variety of kinds of educational measurement is Educational Measurement (E. F. Lindquist, editor) (1950).

Directly or indirectly it is also the means of sustaining a dynamic teaching interest in the learning process and affords the teacher a means of self-evaluation and self-improvement. It can be a stimulus to teacher self-growth and more personal effort and innovation.

The analysis of student failure and withdrawal is a highly valuable source of information about teaching-learning. Attitudinal factors may be especially important here and may reflect some student needs and teaching or program biases that are inimical to the learning process. Student failure or disillusionment may be an individual matter, or it may reflect the lack of a sufficiently sensitive or complete educational approach. The student attrition rate in legal education is an important index of institutional success and failure.

The analysis of student responsiveness, enthusiasm and initiative may point to strengths and weaknesses in teaching skills and in the educational program. Popular teachers at the level of professional education are likely to be respected for their skill in some educative elements and they may be liked for the character of their relations with students. Teachers for whom there is a lack of enthusiasm may lack a dynamic and inquisitive quality in their approach to their subject matter, and they may be lacking in transactional skill. Student initiative optimally is a function of the "openness" of a learning program.[94] Enthusiasm may be generated where students feel encouraged to exercise their own motivations and interests, and to give self-expression rather than passive response to their course of learning.[95] Implicit is the idea that structure, such as content structure, may be helpful to a degree in directing and stimulating students. Beyond a certain point, it may become stultifying.

This brings into focus the matter of examining subject-matter emphasis. Some educational elements may be overemphasized in the learning program; others may be neglected or omitted. The doctrinal element and logical analysis may be offered and repeated in the law curriculum to such an extent that there may be a significant diminishment in learning value.[96]

[94] See notes 18, 36 and 56, above.

[95] Cf. notes 14, 15 and 89, above.

[96] Cf. notes 22, 50 and 77, above, and related text.

Informational elements and transactional skills[97] have recently acquired greater notice but they are still substantially neglected and may be misplaced in the sequence of learning. The fact that they may come last in place and value may reduce the prospect that they can be learned well and accorded the importance they deserve.[98] Valuational elements may be postponed to a later time in professional experience, and the functional dimension of legal education may not be sufficiently systematized or well-formulated.

Evaluation, correctly used, is a vehicle for improvement. It is more than conceivable that subject-matter arrangements along conventional or well-institutionalized lines may deaden the learning experience, waste resources and perhaps fail to provide the range of learning that is needed and desired. Evaluation may suggest that, in part, subject matter is conceptually better divided along the lines of doctrinal learning, informational skill development and transactional skill development than in simple operational terms of torts, criminal law, real property and constitutional law. Assessment may also encourage innovation and experiment to determine whether learning in transactional elements ought to come before learning in doctrinal elements. It is possible, too, that valuational elements can be grouped with transactional elements for learning purposes, and that applicational and functional elements may be shown to have some reciprocal relationship in learning.

Alternative teaching approaches may be considered hand-in-hand with changes, modifications or emphases in subject matter program. It has already been suggested that transactional skills may best be taught through the teaching-learning mode of problem simulation. On the other hand, doctrinal learning may be facilitated in a lecture and recitation (discussion) or pure discussion form. Teaching approaches may or should be adjusted to requirements of learning for a given kind of subject matter. This may mean gauging the inventory of teaching skills a teacher has to determine what and how he might teach best. Teaching, as well as other professional work, does not or should not assume an equivalency of skills.[99] There is very limited truth in the idea that a teacher can be equally competent or skillful in all

97. See note 27 and cf. note 25, above.

98. See Watson (1968), op. cit. supra note 18 at pp. 148-49, and see Redmount, op. cit. supra note 2 at p. 220.

99. Cf. section on "Teacher Thinking and Feeling Processes," above.

the dimensions of his trade.

The conclusion for the teacher is that evaluation serves him as well as the student and the educational program. Whether through supervisory, peer, student or self-assessment, or some combination of these, the teacher can acquire a perspective on his teaching skill and effectiveness. He can learn to perceive biases and blocks in his attitudes that affect his teaching in different ways. He may recognize strengths that should be emphasized and utilized more. He may see characteristics in his teaching that are unyielding and he may learn of weaknesses and short-comings that can be improved with some effort and learning. Attitudes of experimentation and inquiry are the mark of a good teacher and apply to his teaching as well as to his subject matter. These attitudes are a good antidote to the sometimes corrosive effects of seniority and tenure. They become even more important with greater time and experience in teaching. In closing this section we might observe another dictum from the philosopher Dewey whose ideas are seminal in nearly all of education. He said, "The idea of education is the idea of continuous reconstruction of experience." [100]

The legal education process is an appropriate and necessary forum of inquiry. In its ideal form it permits and encourages a systematic conceptual framework by which to gauge learning and teaching experience. In its pragmatic aspects it helps to identify and evaluate what is happening and not happening in legal education. Hopefully, inquiry into legal education is, will be or should be continuous and progressive. It can provide aims and comparisons that make legal education a vibrant, dynamic and enthusiastic experience. More than that, the sharpness provided by constant concern and consideration tends to insure a high quality of lawyer preparation, and sensitive and imaginative effort and skill application in dealing with a variety of matters and problems. It is the author's hope that this conceptual outline of the legal education process will stimulate further active concern and more systematic inquiry into the teaching and learning processes in law at a personal, classroom and institutional level.

---

100. Dewey, op. cit. supra note 4 at p. 93.

There is an epilogue. In his dedicatory address at the Earl Warren Legal Center, University of California at Berkeley, now President Levi of the University of Chicago, speaking for a society in need of good law, said:

> "For the quality of life in a society in transition, the role of law is pivotal. The law's procedures, providing means for participation and fulfillment of the sense of fairness, can draw the society together and give stability in change. Moreover the operation of the legal system causes or retards change." [101]

Some paragraphs further into his address, Levi has Professor Llewellyn answer for the law community and the law teaching profession,

> "The essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of things in any kind of field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man in any field; and then in skills for regularizing the results, for building into controlled, large-scale action such doing of things and such moving of men." [102]

---

101. Levi, Point of View: Talks on Education, p. 59 (1969) (Also published in 56 Cal. Law Rev. 251 (1968)).

102. Id. at 69.

Prefatory Note to An Anatomy of Legal Education

The following thirteen pages represent an effort to set forth, in outline form, the range of considerations relevant to fuller understanding of the learning-teaching process for law which we speak of as legal education. It is thus supplementary to Dr. Redmount's conceptualization of the educational process in expositive form. At the same time it identifies the general structure on which the Clinic program has been developed. The outline is entitled _An_ Anatomy of Legal Education by reason of realization that other "legal anatomists" would come up with differing constructs. Yet it is hoped that the present effort will be of assistance to a better visualization of a complex and dynamic educational operation. Authorship is to be laid at the door of the Director of the Clinic who, however, acknowledges with warm appreciation the invaluable assistance of Dr. Robert S. Redmount, author of the preceding paper and member of the Clinic's Resident Faculty.

AN ANATOMY OF LEGAL EDUCATION

I. Functional Analysis of the Teaching-Learning Process

A. Learning

1. Motivation and Expectation
    - achievement motive
    - conceptual interest
    - pragmatic purpose (learning to do)
    - degree of motivational structure
2. Sensing (Perception and Feeling)
    - perception: fluidity, rigidity and bias
    - feeling: anxiety, empathy, resistance
3. Thinking and Reasoning
    - analytical disposition and skill
    - intuitiveness
    - effects of cognitive dissonance
4. Insight and Judgment
    - inclusiveness (sensitivity)
    - differentiation (clarity)
5. Learned Attitudes and Dispositions
    - social concern - policy interest
    - intellectual inquisitiveness - research interest
    - emotional sensitivity - ministerial interest

B. Teaching

1. Teaching Motivation and Disposition
    - conceptions
        - law
        - teaching
        - learning process
    - involvement
        - degree of involvement
        - personal objectives in teaching
        - other personal objectives
    - kind of involvement
        - teaching interests
        - reserve interests
        - service interests
2. Learning Aims
    - assimilation of knowledge
        - areas
    - development of skills

reasoning, composition, perception,
intuitiveness, communication, psychological
relation, valuation

acquisition of disposition to sense, learn and participate

3. Role Conception
    - directive v. participation (action)
    - evaluative v. reflective (judgment)
    - decisive v. inquisitive (knowledge)

C. Dynamics of Teacher-Student Interaction

1. Emotional Stimulation
    - use of support and encouragement
    - use of aggressiveness and demand
    - use of fear and criticism

2. Intellectual Stimulation
    - use of problem solving
    - content form and organization
    - personal and social relevance

3. Communication and Relations

enunciation	formal v. informal
clarification	involvement v. aloofness
reflection	supportive v. demanding
criticism	
questioning	

4. Responsive Behavior and Learning Evaluation
    - student cooperation and effort
    - student hostility and antagonism
    - student inquisitiveness and enthusiasm
    - student boredom or indifference
    - student skill development and discipline
    - student patterns of professional interest
    - student views of professional responsibility
    - student continuing emotional sensitivity, intellectual inquisitiveness, and social concern

II. Educational Components of Legal Learning

A. Informational

1. Fact Ascertainment
    - dimensions of facts
        - observable, intuitive, inferrable, propositional, discrete or system-related
    - sources of facts
        - physical, recorded, testimonial

- fact-finding methods
    - historical inquiry (reconstruction)
    - empirical inquiry (observation)
    - rational deduction (inference)
    - psychological inquiry (inference and intuition)
    - authoritative postulations (postulation)

2. Fact Discrimination and Evaluation
    - adequacy of facts
        - completeness, validity, reliability, viability
    - assessment of facts
        - mathematical or statistical assessment
        - logical assessment
        - impressionistic assessment
        - opinion support (expert and lay)

3. Law Ascertainment
    - primary sources
        - decisions, statutes, administrative regulations
    - secondary sources
        - texts, treatises, digests, citators

B. Theoretics

1. Legal Analysis
    - adjudicatory case analysis
        - dictum, holding, stare decisis, analogy
    - statute analysis
        - validity, conflict interpretation
    - law office "live" case analysis
        - relevant law propositions, immediate case application, immediate case consequences

2. Legal Method
    - procedure
        - function, process, canalization of discretion, testing for results
    - substance
        - relevance, effectiveness, flexibility

3. Doctrinal Exposition (Legal and Non-Legal)
    - orientation of conception
        - classificatory (relational)
        - explanatory (causal)
        - predictive (formulary)
    - testing and examining procedures
        - methods of proof
        - standards of proof
    - technological development
        - system completeness
        - reliability of formulations
        - methodology for change or modification
        - implementation into legal, physical, psychological or social operations

C. Applicational

1. Problem Formulation (Diagnosis)
   - normative references
     - legal, social, economic, ethical, psychological
   - constant factors
     - factual references
     - legal desiderata
       - subject-matter law
       - pervasive legal concepts
   - risk factors
     - factual possibilities
     - legal issues
     - legal consequences
     - party/social consequences

2. Problem Solution (Synthesis)
   - personal/social desiderata
   - choice of legal methods
   - choice of legal concepts
   - non-legal references and methods
   - anticipated legal and party/social consequences

3. Implementational Skills
   - forms of articulation
     - documentary drafting, briefing, memorandum preparation, oral advocacy, interviewing and counseling
   - organizational emphases
     - major and minor theses
     - elements of support and proof
     - clarity and force of conclusions
   - principles of presentation
     - order and coherence, clarity, incisiveness

D. Transactional

1. Contexts of Interpersonal Relationships
   - client interviewing and counseling
   - litigious
   - negotiatory
     - negotiation and settlement
   - public hearings
   - institutional consultation

2. Role Characteristics
   - attorney
     - decisional, psychological, advisory, mediational, implementational
   - client or litigant
     - character
       - personal or institutional
     - objectives
     - law need and expectation

3. Persuasion Skills
    - style of rhetoric
    - use of logic
    - kinds of emotional appeal

E. Functional

1. Law as Correction
    - standards of conduct
    - remedies for violation
    - means of correction
    - effects of corrective procedures
    - law change with new correctional knowledge

2. Law as Social Engineering
    - community function and operation
    - institutional role in relation to problems and conflicts
    - implementation in economic, political, psychological, social theories and practices

3. Law as Policy Science
    - defining social ends
    - implementing means to social change

F. Valuational

1. End Values in Order of Importance

2. Mean values in Order of Emphasis

3. The Handling of Value Conflicts
    - character of conflicts
    - means of resolution

4. Ethical Performance
    - parties
        - social institutions
        - legal institutions
        - judges
        - attorneys
        - clients
    - requirements
        - legal standards
        - ethical standards
        - custom and practice
    - corrective means
        - legislative and judicial
        - professional (law)
        - social (community, family, etc.)

III. Methodological Considerations in Instruction

A. Structural Character of Substantive Law Materials

1. Character of Problems and Issues to be Studied

2. Form of Experience or Knowledge Used to Deal with Problems and Issues

3. Central Themes or Issues to be Developed
    - units of learning

4. Generative Methods to Develop Inquiry and Insight
    - logical propositions
    - empirical information and data

5. Procedures for Connection and Relation between Content Elements
    - logical continuity
    - continuity of value emphasis
    - continuity of social or historical experience

B. Introduction and Use of "Non-Legal" Materials

1. Perspectives and Values Identified and Stressed

2. Conceptual Structure of the Subject Matter

3. Methodological Approaches Utilized

4. Effective Interpretation and Use of Materials and Procedures in the Legal Context
    - problems in effective translations and integration
        - relation of legal and non-legal conception
        - conjunction of legal and non-legal theory
        - fact usage
    - problems of inhering differences
        - stress in values
        - character and organization of knowledge
        - procedural emphases

C. Organization of Substantive Materials for Teaching-Learning

1. Theoretical Emphasis
    - policy (goal-oriented)
    - historical (continuity-oriented)
    - problem-solving (client-oriented)
    - logical (consistency-oriented)

2. Standards and Doctrine
    - kind
        - substantive v. procedural
        - general v. limited
        - degree of certainty and consistency
        - degree of conflict and uncertainty
    - usage
        - mandatory or discretionary
        - absolute v. variable interpretation
        - end value v. instrumental value
        - definitive reference v. experimental application

3. Factual Emphasis
    - fact choice
        - kind of facts
            - empirically-determined
            - rationally-postulated
            - a priori stipulation
        - correlation with theory
    - fact development
        - kind of inquiry
        - degree of elaboration
        - kind of verification
    - fact usage
        - postulate theory
        - proof of theory
        - fact clarification

4. Sequential Approach
    - order of presentation
        - problems and issues
        - theoretical considerations
        - doctrinal choice and possibility
        - fact considerations
    - degree of emphasis
        - analysis and elaboration
            - value and attitude factors
            - factual issues and considerations
            - theoretical views and implications
            - doctrinal holdings and alternatives
            - problem difficulty and complexity
        - repetition and reinforcement
            - problem formulation and solution
            - fact inquiry
            - theoretical development
            - doctrinal development
    - assimilation and transferability
        - extent and timing of memorization
        - point of grasp and application of generalized principles
        - transferability of elements to new learning units

D. Organization of Instruction

1. Use of Motivation
    - student - directed
    - instructor - cultivated

2. Teaching Approach
    - intellectual approaches
    - emotional emphases

3. Programmatic Choices
    - formal v. informal
    - group v. indivudal structuring
    - student oriented v. subject oriented

4. Content Emphases
    - structural breakdown
    - sequential breakdown
    - course or program development and organization

5. Combining and Sequencing of Elements

6. Evaluation of Instructional Arrangement
    - internal coherence and validity
        - in terms of teaching-learning principles
        - in terms of subject matter needs
    - experiential findings
        - evidence of substantive learning
        - evidence of teaching-learning attitudes

7. Overall Curricular Design
    - subject matter relationships
    - teaching-learning methodologies
    - experimental and revisionist emphases
        - substantive possibilities
        - teaching approaches

E. Programmatic Approaches to Teaching-Learning

1. Lecture and Recitation
    - orientation
        - problem emphasis
        - Socratic skills
    - content emphasis
        - allocation to lecture and to recitation
        - sequence
    - analysis of communications and response
        - student involvement
        - learning effectiveness

2. Workshop, Seminar and Small Group Conference Approach
    - types of leadership
    - emphasis on learning

3. Problem Simulation
    - scope of problem
    - method of presentation
    - means of analysis
    - teaching-learning communications process
    - nature and effectiveness of learning

4. Tutorial Learning
    - subject matter concentration
    - units of instruction
    - teaching aims and means
    - student motivation and response

5. Team Teaching
    - objectives
    - discrete value, content, procedure or teaching emphases
    - division and distribution of subject matter
    - problems in communication
        - overlap
        - ambiguity
        - contradiction
    - evaluation
        - impacts on students
        - learning emphases and value

6. Research Projects as Teaching
    - aims of the project
    - scope of subject matter
    - organization of work and learning responsibilities
    - needs and problems in execution
    - structure of communication in teaching-learning
    - evaluation of progress and outcome

7. "Programmed Learning"
    - scope of subject matter
    - learning objectives
    - units of learning material
    - sequence in presentation and learning
    - speed of learning and amount of reinforcement

8. Practice Simulation
    - moot court
    - appellate practice
    - law office simulation
    - other

9. Field Learning and Apprenticeship
    - context
        - courts
        - legislatures
        - law office (type)
        - public lawyering agencies
        - police and correctional institutions
    - length of experience
    - emphasis in learning
    - control of learning experience
    - evaluation procedures

F. Teaching Style

1. Content Emphasis
    - stress on knowledge v. process
    - stress on theoretical analysis and legal technology
    - stress on problem solving and effective party result
    - stress on policy considerations and relevance of solution
    - unstructured as to goals, means or subject

2. Approach to Students
    - type of interaction
        - provocative to induce student coping
        - declarative to give student information and guidelines
        - solicitive to support student in latter's aim and interest
    - semantic operations
        - focus on intellectual meanings and logical relations
        - focus on usage and context
        - focus on vagueness or ambiguities
        - emotional emphases in communication
    - dramatic techniques
        - use of theatrical style or flair
        - use of simulation
        - use of context for dramatic purposes

IV. Evaluation of the Legal Education Experience

A. Evaluation of Learning

1. Purpose of Evaluation
    - final learning assessment
    - assessment of learning progress
    - diagnosis of learning lacks and problems
    - stimulation of student effort
    - discrimination between students

2. Evaluation Components
    - subject matter retention
    - problem-solving ability
    - discrete skills
        - reasoning
        - intuition
        - perception
        - psychological relation
        - communication
        - composition
        - evaluation
    - imagination and creativity
    - prefessional dispositions and motivations
    - continuing intellectual inquisitiveness, emotional sensitivity and social concern

3. Time Sequence in Evaluation
    - retrospective, based on post-law school experience
    - continuous, based on continuing and total law school experience
    - sequential, based on discrete groupings of learning matters
    - segmented, based on individual course completion
    - frequency of interim evaluations
    - frequency of definitive evaluations

4. Methods of Measurement
    - group and individual opinion (teacher and/or student)
    - student project planning, execution and completion

- employer, senior professional or co-professional evaluation
    - ('internship' and/or post-law school experience)
- research contribution
- public and professional contribution
- formal oral examination
    - information-oriented
    - problem-oriented
    - attitude-oriented
- formal written examination
    - problem emphasis
        - definition by instructor; solution by student
        - definition and solution by student
    - information emphasis
        - knowledge and development of theory
        - fact knowledge and implications
        - problem definition and solution
            - theoretical choices
            - practical choices
            - value consideration
- examination form
    - subjective
        - essay, closed or open book
    - objective
        - open choice (completion)
        - forced choice (true-false, multiple choice, matching)

5. Methods of Estimation and Judgment
    - criteria
        - minimum or general professional performance (estimate)
        - optimal student performance (estimate)
        - typical or minimal student performance (estimate)
        - objective measurement standards
    - means
        - objective
            - raw score assignments and totals
            - weighing of items and scores
            - negative scoring
            - use of central tendencies (e.g., means, medians, middle proportion)
            - grouping of variations from mean: inferior to superior
                - standard deviation and other grouping methods
                - alphabetical v. numerical symbols of performance
            - 'curving' of class results
            - pass-fail judgment
        - subjective
            - use of model with defined standards
                - use of judging outline
            - use of multiple and combined judgments; comparative judgment
            - scoring by question (scoring all students simultaneously on each question)
            - scoring by student (entire student examination at once)
            - rank-ordering of student performance

- critical limits
    - means of determination
        - pre-set minimum standards
        - statistical distribution and "cutting point"
    - means of review and adjustment
        - reexamination-similar type
        - different type of examination
        - multiple review of judgment of failure
        - supplemental learning effort
        - supplemental work or project contribution
        - no review or modification w/o extenuation

B. Evaluation of Instruction

1. Student Scores on Standardized Subject-Matter Examinations
    - comprehensive school examinations
    - certification examinations

2. Student Judgments of Instruction
    - content coverage
        - preparation
        - organization
        - clarity of communication
    - interest stimulation
        - challenge v. boredom
        - relevance v. remoteness
    - teaching approach
        - negative or destructive elements
            - aggression and excessive criticism
            - indifference or dullness
        - positive or constructive elements
            - sensitivity and responsiveness to student
            - degree of personal interest and involvement
            - imagination and searching disposition
    - evaluation methods
        - adequacy and fairness of examination forms
        - fairness and equivalency in scoring
        - reasonableness of judgment
        - explanation and elaboration of criticisms of student performance

3. Curriculum Committee or Other Faculty Judgments of Instruction
    - completeness or thoroughness of subject matter treatment
        - adequacy of preparation
            - outline preparation
            - use of reference materials
            - use of audio-visual aids
            - use of demonstration
            - other adjunctive devices
        - evaluation of teaching skills
            - adequacy of presentation
            - effectiveness of persuasion

    - sensitivity to student need and response
    - use of semantic skills
    - use of dramatizing methods
  - effectiveness of evaluation procedures
    - source of examination materials
    - adequacy of examination methods and content
    - fairness of scoring and judgments
  - recommendation of alternatives
    - in subject matter arrangement
    - in teaching approach

C. Evaluation of Educational Program

1. Theoretical Emphases and Neglects

2. Skill Emphasis and Range of Skill Development

3. Organization of Curriculum Content
   - structural arrangement of substantive matter
   - sequential arrangement of substantive matter
   - discrete groupings of course and program material
   - use and integration of "non-legal" materials

4. Emphases in Teaching Approaches
   - use of Socratic and rationalistic methods
   - use of empirical inquiry or reference
   - use of clinical emphases and methods
   - emphasis on doctrinal and legal information development
   - emphasis on research and policy considerations
   - emphasis on fact development and transaction

5. Distribution of Teaching Skills
   - teaching interests
   - individual and combined skills
     - strengths and weaknesses

6. Program Comparability
   - reference to A.A.L.S. standards
   - comparison with elite schools
   - comparison with statistical average
     for school of similar type

7. Program Effectiveness
   - bar examinations standards
   - A.B.A. or A.A.L.S. school certification standards
   - alumni judgments
   - judgments of employers and bar groups
   - school curriculum committee judgments
   - dean's office judgments
   - student judgments
   - consultant or extra-professional judgments

8. Further Program Experimentation and Revision
   - design
   - implementation
   - evaluation

ACKNOWLEDGMENTS

The remaining materials in these Advance Readings are not original to the Law Teaching Clinic. They have appeared in a law or general periodical and each is reproduced for Clinic use through the courtesy of author and publisher. The specific acknowledgments follow:

Bruner, The Skill of Relevance or the Relevance of Skills. SATURDAY REVIEW for April 18, 1970. Copyright, 1970 Saturday Review, Inc. Reprinted by permission of Dr. Bruner and the Review.

Stevens, Aging Mistress: The Law School in America. CHANGE MAGAZINE for January - February, 1970. Reprinted with the permission of Professor Stevens and Science and University Affairs, publisher.

Watson, Professionalizing the Lawyer's Role as Counselor: Risk-Taking for Rewards. 1969 LAW AND THE SOCIAL ORDER 17. Reprinted by permission of Law and the Social Order with Dr. Watson's approval.

Kelso, Behavioral Psychology: Springboard for Imaginative Legal Educators. 45 DENVER LAW JOURNAL 313 (1968). Reprinted by permission of the Denver Law Journal with Professor Kelso's approval.

Probert and Brown, Theories and Practices in the Legal Profession. 19 UNIVERSITY OF FLORIDA LAW REVIEW 447 (1967). Used by permission of the University of Florida Law Review with the approval of the authors. Copyright 1967 by the University of Florida Law Review.

Redmount, Humanistic Law Through Legal Education. 1 CONNECTICUT LAW REVIEW 201 (1968). Reprinted by permission of the Connecticut Law Review with Dr. Redmount's approval.

Friedman and Ladinsky, Social Change and the Law of Industrial Accidents. 67 COLUMBIA LAW REVIEW 50 (1967). Used by permission of the Columbia Law Review with the approval of the authors.

Jones, The Practice of Justice. 1966 WASHINGTON UNIVERSITY LAW QUARTERLY 133. Reprinted by permission of the Washington University Law Quarterly with Professor Jones' approval.

Reich, Toward the Humanistic Study of Law. 74 YALE LAW JOURNAL 1402 (1965). Used by permission of the Yale Law Journal, of Fred B. Rothman & Company, and of Professor Reich.

The Skill of Relevance or the Relevance of Skills

by JEROME BRUNER

About a decade ago I became actively involved in what was to become known as the "curriculum-reform movement" in American education. The initial objectives of this movement were simple yet moving in their aspiration. The teaching of science (and that was the founding concern soon to be generalized to other subjects) must be made to represent what science was about so that modern man might have some better sense of the forces that shaped his world. The underlying conception was a rationalistic one: By knowing nature and being adept in the ways of thinking of science and mathematics, man would not only appreciate nature, but would feel less helpless before it, and would achieve the intellectual dignity inherent in "being his own scientist."

Looked at as merely an effort to improve the teaching of science and the other disciplines, the reform movement seems admirable in retrospect, though parochial, and from the broader point of view of "man's striving to control the world," somewhat old-fashioned, even a tiny bit absurd. But there were two inadvertent and powerful side-effects that were generated that still perturb our educational establishment, and that still go on producing changes in the practice of instruction. One of them is administrative in the broadest sense; the other is psychological.

The administrative effect of the curriculum revolution was to redefine the way in which a curriculum was made. The moment one says that physics should be taught not to spectators but to participants, that we should teach physics rather than *about* physics, then the physicist must be brought into the process of curriculum maker, along with the teacher. For the basic assumption is that physics is not so much the *topic* as it is the mode of thought, an apparatus for processing knowledge about nature rather than a collection of facts that can be got out of a handbook. And so, in very rapid succession, some of America's most distinguished scientists and mathematicians became involved with teachers, school superintendents, ministers of education—the lot. First it was physics and mathematics, but within the decade chemists, biologists, anthropologists, economists, and even historians were involved in making curricula of their own. It was a poor project indeed that could not boast a Nobel laureate or a Bancroft Prize winner in its list of consultants. There was stress and strain when working scientists came face to face with the realities of the working teacher or the working school budget. And there were moments of despair when some of my less patient scientific colleagues talked about making their particular curriculum "teacher-proof." It was a little like making love people-proof. But even the complaints about the teacher as spoiler grew out of respect for the basic task of equipping the student with the competency inherent in the subject matter. Nothing must interfere, not even the teacher. In the end, what have emerged from the collaboration of scientists, scholars, and teachers are nationally distributed curriculum materials, embodying points of view about learning to which I shall turn shortly, curricula that represent an extraordinary achievement in academic quality and in the respect they show for the nature of human thought processes. Quietly we have achieved a revolution in the way we make curriculum, and it has now become world-wide, in the developing as in the developed world.

What is meant when we say that physics (or mathematics or a language or some other subject) is not something that one "knows about" but is, rather, something one "knows how to"? Plainly, one is neither quite committing something to memory to be tested by the usual means, nor is one learning to perform on cue like a trained seal or one of Professor Skinner's pigeons. Rather, when one learns physics, one is learning ways of dealing with givens, connecting things, processing unrelated things so as to give them a decent order. It is a way of connecting what one observes and encounters so as to highlight its redundancy, and therefore to make it as obvious as possible. To use what has now become a familiar phrase, it is an approach to learning that emphasizes ways of getting from the surface of the observed to its underlying structure of regularity. In this sense, it is a constant exercise in problem-formulating and problem-solving.

Good "problems," it turns out on closer inspection, are the chief vehicle for good curricula whether one is in an ordinary classroom or alone in a cubicle with a teaching machine. In the main, formulated problems are of two kinds. One has to do more with the formal or analytic structure of the operation—the syntax of the subject. Being able to express acceleration for a set of velocities in an equation, or showing wherein Snell's law for the pressure of light must or must not be a necessary corollary of the conservation theorems—these are examples of exercises principally with the syntactic structure of a body of knowledge. These are problems that relate to logical implication, identity, equivalence, and transformational rules. They are mastered by considering the language and the notational system, and not by looking at rocks and trees.

There is a second set of problems

JEROME BRUNER is professor of psychology and director of the Center for Cognitive Studies at Harvard University. This article is adapted from a paper presented at a symposium on "Education in the Seventies," sponsored by Encyclopaedia Britannica International, Ltd., London, January 1970.

that have to do principally with the semantic aspect of a science. How high is some particular building, or what temperature is needed to desalinate a certain volume of sea water, or what is the perturbation around a foil passing through a given medium, given such and such Reynolds number? There is involved here some form of determination of a value, a way of getting access cannily to a physical phenomenon. Looking at rocks and trees is very much at the heart of it, but looking at them with a highly assisted eye turns out to be central. A good field is one where one doesn't have to go about making such empirical determinations very often, and we know that things are getting better when we can reconstruct how something should be from what is already known rather than being a brave and naked empiricist.

We came to treasure problems of both types: the former are "think" problems, the latter are laboratory exercises. Both are formulated by the instructor, the text, or the manual, and both are important in any science, art, or practical sphere.

But neither is much like problem-finding. When Hahn and Strassman made their fundamental discovery about the transmutation of uranium under certain conditions of bombardment, they wrote that they were unsure how to cope with the surprise of an element changing its atomic weight, which is possible only in alchemy. It was the implausibility rather than the improbability that shook them—as with bridge hands, all of which are equally improbable, but one in a single suit is implausible while a Yarborough of the same probability escapes attention altogether as extraordinary. One has no doubt whatsoever that the hare can overtake the tortoise. Problem finding comes when one senses that there remain some dark problems about whether a divisibility rule may not be consistent with another rule about minimal invariant units in ordinary algebra. Nor is it plain that the invention of the calculus resolves Zeno's paradox once for all. All of these are matters involving the raising of problems, rather than their solution. They require many of the same skills and the same knowledge of underlying regularity of problem-solving. But they basically require the location of incompleteness, anomaly, trouble, inequity, and contradiction.

In none of what we have described thus far is there anything like memorization or performing a particular repertory. Conventional learning theories have little to do with the matter, and it seems inconceivable that there stands between you and understanding a missing word of praise or a chocolate bar. Rather, what seems to be at work in a good problem-solving "performance" is some underlying competence in using the operations of physics or whatever, and the performance that emerges from this competence may never be the same on any two occasions. What is learned is competence, not particular performances. Any particular performance, moreover, may become "stuck" or overdetermined by virtue of having been reinforced. It is like the wicked schoolboy trick of smiling when the teacher utters a particular word, and before long the teacher is using it more often. But to confuse that phenomenon with language is as much of a mistake as confusing the trained seal piping "Yankee Doodle" with the improvisation of a variation on the piano.

You may by now have recognized the parallel between what I am suggesting and what we have come to know about language comprehension and production, and their acquisition. Learning to be skillful with a body of knowledge is much like learning a language, its rules for forming and transforming sentences, its vocabulary, its semantic markers, etc. As with language, there is also the interesting feature in all such learning that what is learned is initially "outside" the learner—as a discipline of learning, as a subject matter, as a notational system. This we shall examine later.

Now, it has been the long-established fashion among traditionally anti-mentalist psychologists to dodge the issue of skill and competence by asserting that, while common sense may see it this way, the "real" explanation of learning is to be found at the molecular level of discrete stimuli and responses and their connections and reinforcements and generalization. What goes on at the common-sense level, as ordinary learning would be called, is simply a matter of engineering, a case of figuring out how to put the elements together in the right way by the correct contingencies of reinforcement or the management of contiguities. I believe this to be a wildly mistaken model of learning based on some very erroneous ideas that have stood up very poorly to the test of the laboratory or of the classroom.

Let me outline briefly what is meant when we say that human beings learn skills. The simplest form of skill is sensorimotor (tool using, car driving, etc.), and its form of acquisition has been described with increasing precision over the past quarter-century by Sir Frederic Bartlett and his students—Craik, Broadbent, Welford, and others. In broad outline, skilled action requires recognizing the features of a task, its goal, and means appropriate to its attainment; a means of converting this information into appropriate action; and a means of getting feedback that compares the objective sought with present state attained. This model is very much akin to the way in which computerized problem-solving is done, and to the way in which voluntary activity is controlled in the nervous system. The view derives from the premise that responses are not "acquired" but are constructed or generated in consonance with an intention or objective and a set of specifications about ways of progressing toward such an objective in such a situation. In this sense, when we learn something like a skill, it is in the very nature of the case that we master a wide variety of possible ways for attaining an objective—many ways to skin the cat. For we learn ways of constructing a myriad of responses that fit our grasp of what is appropriate to an objective.

One is able to operate not only upon the world of physical objects by the use of sensorimotor skills, but also operate in a parallel fashion upon that world as it is encoded in language and other more specialized symbol systems. For such symbol systems "represent" the world and the relations that hold between its different aspects. Indeed, this is what is so extraordinary about the power to symbolize—precisely that it has this representative function (a matter that surely vexes philosophers, in spite of the boon it bestows on ordinary men). This is what makes the "external" forms of systems like natural language or mathematics or a scientific discipline such powerful tools of culture. By making them part of our own symbolic skill, we are able to use them internally as instruments of our own thought. Physics becomes now an operation of the human mind, and physics thinking becomes a psychological topic. It is an instrument of thought or a skill rather than a "topic."

It was basically this set of convictions that led those of us who were in the midst of curriculum reform to propose that *doing* physics is what physics instruction should be about—even if the instruction had very limited coverage. And we proposed that doing it from the start was necessary, even if at the outset the student had only the vaguest intuition to fall back upon. The basic objective was to make the subject your own, to make it part of your own thinking—whether physics, history, ways of looking at paintings, or what not. There follow from this view of competence as the objective of education some rather firm conclusions about educational practice. To begin with, a proper curriculum in any subject (or in the total curriculum of the school) requires some statement of objectives, some statement of what kinds of skill we are trying to create and by what kinds of performances we shall know it. The essence of such behavioral objectives is the specification of a test of skill—testing the ability to get to an objective in situations and with materials not yet encountered.

Does it sound familiar? Is it not what was initially intended? How did we get so far off the track in setting up our educational practices? Why was this rather simple notion not followed up? I suspect that part of the difficulty was introduced by wrongly focused theories of learning that lost sight of the forest of skilled competence for the trees of perfected performances. But that is only part of it. There is a very crucial matter about acquiring a skill—be it chess, political savvy, biology, or skiing. The goal must be plain; one must have a sense of where one is trying to get to in any given instance of activity. For the exercise of skill is governed by an intention and feedback on the relation between what one has intended and what one has achieved thus far—"knowledge of results." Without it, the generativeness of skilled operations is lost. What this means in the formal educational setting is far more emphasis on making clear the purpose of every exercise, every lesson plan, every unit, every term, every education. If this is to be achieved, then plainly there will have to be much more participatory democracy in the formulation of lessons, curricula, courses of study, and the rest. For surely the participation of the learner in setting goals is one of the few ways of making clear where the learner is trying to get to.

This brings us directly to the problem of relevance, that thumb-worn symbol in the modern debate about the relation of education to man and society. The word has two senses. The first is that what is taught should have some bearing on the grievous problems facing the world, the solution of which may affect our survival as a species. This is social relevance. Then there is personal relevance: What is taught should be self-rewarding, or "real," or "exciting," or "meaningful." The two kinds of relevance are not necessarily the same, alas.

I attended a meeting in Stockholm in the summer of 1969, convened by the Nobel Foundation with the object of bringing scholars and scientists together to discuss the burning issues of the day. We had in attendance as well a panel of university students to voice their own concerns. I recall one session at which two molecular biologists, Joshua Lederberg of Stanford and Jacques Monod of Paris, were discussing the socially risky and morally compelling problems involved in improving man's genetic makeup with the aid of modern molecular biology. When the discussion was nearing its end, several students expressed disappointment in our avoidance of "relevant issues." Why had we not engaged ourselves with the crucial issues of the day: with the developing world, with the population explosion, with the scourge of war?

Jacques Monod replied with Gide's favorite proverb, "Good intentions make bad literature." I would change it to "Good intentions alone. . . ." For it is precisely, again, a question of skill and understanding that is at issue. I am with those who criticize the university for having too often ignored the great issues of life in our time. But I do not believe that the cure in the classroom is to be endlessly concerned with the immediacy of such issues—sacrificing social relevance to personal excitement. Relevance, in either of its senses, depends upon what you know that permits you to move toward goals you care about. It is this kind of "means-ends" knowledge that brings into a single focus the two kinds of relevance, personal and social. It is then that we bring knowledge and conviction together, and it is this requirement that faces us in the revolution in education through which we are going

I have suggested that the human, species-typical way in which we increase our powers comes through converting external bodies of knowledge embodied in the culture into generative rules for thinking about the world and about ourselves. It is by this means that we are finally able to have convictions that have some consequences for the broader good. Yet, I am convinced, as are so many others, that the way in which our ordinary educational activities are carried out will not equip men with effective convictions. I would like to propose, in the light of what I have said about skill and intentionality, and to honor what I believe about the two faces of relevance, that there be a very basic change in pedagogical practice along the following lines:

First, education must no longer strike an exclusive posture of neutrality and objectivity. Knowledge, we know now as never before, is power. This does not mean that there are not canons of truth or that the idea of proof is not a precious one. Rather, let knowledge as it appears in our schooling be put into the context of action and commitment. The lawyer's brief, a parliamentary strategy, or a town planner's subtle balancings are as humanly important a way of knowing as a physicist's theorem. Gathering together the data for the indictment of a society that tolerates, in the United States, the ninth rank in infant mortality when it ranks first in gross national product—this is not an exercise in radical invective but in the mobilizing of knowledge in the interest of conviction that change is imperative. Let the skills of problem solving be given a chance to develop on problems that have an inherent passion—whether racism, crimes in the street, pollution, war and aggression, or marriage and the family.

Second, education must concentrate more on the unknown and the speculative, using the known and established as a basis for extrapolation. This will create two problems immediately. One is that the shift in emphasis will shake the traditional role of the teacher as the one who knows, contrasting with the student who does not. The other is that, in any body of men who use their minds at all, one usually gets a sharp division between what my friend Joseph Agassis calls "knowers" and "seekers." Knowers are valuers of firm declarative statements about the state of things. Seekers regard such statements as invitations to speculation and doubt. The two groups often deplore each other. Just as surely as authority will not easily be given up by teachers, so too will knowers resist the threatening speculations of seekers. Revolution does have difficulties.

With respect to encouraging speculative extrapolation, I would particularly want to concentrate on "subjects" or "disciplines" that have a plainly visible growing edge, particularly the life sciences and the human sciences: human and behavioral biology, politics, economics, sociology, and psychology organized around problems, solutions to which are not clearly known. The reward for working one's way through the known is to find a new question on the other side, formulated in a new way. Let it be plain that inquiry of this kind can be made not just through "the social sciences" but equally via the arts, literature, and philosophy, as well as by the syntactical sciences of logic and mathematical analysis.

Third, share the process of education with the learner. There are few things so exciting as sensing where one is trying to go, what one is trying to get hold of, and then making progress toward it. The reward of mastering something is the mastery, not the assurance that some day you will make more money or have more prestige. There must be a system of counseling that assures better than now that the learner knows what he is up to and that he has some hand in choosing the goal. This may be raising the specter of totally individualized instruction. But learning *is* individual, no matter how many pupils there are per teacher. I am only urging that in the organization of curricula, units, and lessons there be option provided as to how a student sets his goal for learning.

Fourth and finally, I would like to propose that as a transition we divide the curriculum into a Monday-Wednesday-Friday section that continues during the transition to work with what has been best in our school curricula up to this point, and a Tuesday-Thursday curriculum that is as experimental as we care to make it—seminars, political analyses, the development of position papers on school problems, "problem-finding" in the local community, you name it. Let it be as controversial as needs be. We are lacking diversity in experiment, and can afford controversy in order to get it. Tuesday and Thursday need be no respecter of conventional teaching qualification. Indeed, it might provide the proper occasion for bringing outsiders into the school and "hooking" them with its challenge. I would also want to bring to the school (or to its pupils on visit) other than the conventional media of learning — film, political debate, and the carrying out of plans of action, all to be subject to scrutiny, discussion, and criticism.

I am no innocent to matters of schooling and the conduct of instructional enterprises. What I am proposing involves a vast change in our thinking about schools, about growth, about the assumption of responsibility in the technological world as we know it. I have wanted to highlight the role of intention and goal-directedness in learning and the acquisition of knowledge, the conversion of skill into the management of one's own enterprises. The objective is to produce skill in our citizens, skill in the achieving of goals of personal significance, and of assuring a society in which personal significance can still be possible.

SR/APRIL 18, 1970

Aging Mistress: The Law School in America

By Robert Stevens

So far, law students have rarely been involved in campus violence, but at a growing number of law schools the students are actively making radical demands. Professors at many schools are aware not only of rising student dissatisfaction but also of the intellectual doubts and reservations held by members of their own profession. Legal education, wrote the current chairman of the American Association of Law Schools' committee on curriculum recently, "is in a crisis . . . fundamental changes must be made soon. It is not only that law students over the country are reaching the point of open revolt but also that law faculties themselves, particularly the younger members, share with the students the view that legal education is too rigid, too uniform, too narrow, too repetitious and too long."

All this may strike some as surprising. The law school, at least on some campuses, has traditionally appeared to be one of the more intellectually demanding and rigorous parts of the university. The first year of law school—successfully survived—was regarded by the upwardly mobile (and others) as a passport to membership in the national or local establishment, depending on the reputation of the law school. And, of all institutions, was not the law school the most relevant? Was it not thought to be so relevant, indeed, that it was often dismissed by traditional academics as a trade school? In an era of campus turmoil, would not such attributes protect the law schools from unrest and criticism? Why, then, have so many law students and a significant number of academic lawyers joined the clamor for reform in legal education?

There are no simple answers. Law schools vary enormously. Dissatisfied academics come in infinitely varied shapes and sizes, and their dissatisfaction covers a spectrum from those who would make law schools the preserve of the traditional scholar to those who would turn them into centers for social action. Student bodies similarly are not monolithic. Students vary considerably from school to school and, more importantly, *within* individual schools, even if the most articulate student spokesmen in any given school appear to be unanimous. There are students who complain that law school is intellectual only in the most superficial sense, while others—numerically larger, one suspects—indict the legal curriculum for irrelevance. The mixture of views varies with the school. At many of the "local" law schools, student criticism may still focus on the fact that insufficient emphasis is placed on black letter law, or the complaint may be that the school teaches "national" rather than "local" law. But at the national schools (and as legal education currently exists one cannot avoid such elitist distinctions), the battles more often swirl around the themes of substantive relevance, intellectual content and professional *raison d'etre*. The educational innovations in law in the thirties and forties made the curriculum more relevant—to American business and labor—something which the students of those days demanded. Today, the curricula of the law schools is edging toward a greater concern with poverty, urban problems and the environment, but to this generation of student leaders the pace seems to be that of a snail. With "irrelevance" the battle cry, those who regard the interests of the local black community as the test of relevance are having a field day in the law schools.

So too are those radicals who might loosely, and perhaps unfairly, be termed the hippie wing of the Movement, who are concerned primarily with the atmosphere of education. If sensitivity training is the criterion of desirability in legal education, then

---

Robert Stevens, a graduate of Oxford and Yale Universities, is professor of law at Yale.

the law schools, to be sure, are eminently undesirable, and for understandable reasons. Empirical studies have consistently suggested that law has attracted what might be described as the competitive and somewhat aggressive members of the nation's intellectual elite, and many of the elite of *that* elite go on to be law teachers. This too is not surprising. The core of the legal system is still assumed to be litigation, and in the common law, litigation is an intensely adversary system. The case-class and socratic methods of teaching represent an essentially hostile model on which, for a hundred years, students of that legal system seemed to thrive. It separated the wheat from the chaff, and the chaff was conveniently forgotten. But many in this generation of students are not so forgetful of the chaff and would argue that the high-grade wheat is increasingly irrelevant in the constructive roles (as opposed to the adversary roles) which lawyers are, or will be, called on to perform.

There are other underlying causes of the malaise which many have claimed they see enveloping the best-known law schools. Perhaps the most pressing is the new level of academic preparation of the students themselves. Law students are far better prepared than they were even ten years ago. An increasing number—a clear majority in a few elite schools—have worked or studied abroad, or have a graduate degree, or have extensive experience in politics or social action. Even at schools where this is not so, the students are frequently recruited from undergraduate honors programs in which they have had access to high quality teaching, writing and research programs, or other intellectually stimulating opportunities. To such students, the first year of law school, with its strange mix of intellectual rigor and the patronizing atmosphere of first grade, is no longer readily acceptable. And students who are turned off in their first year are unlikely to develop intellectual excitement in the second or third. It is such students who feel that they have been kept absurdly long in an over-structured environment.

Many of these complaints might be less important if students of various persuasions did not sense that faculty members, too, are suffering a crisis of identity. The case method was invented to teach substance, yet its predominant purpose is now apparently to instill methodology: What then has happened to substance? Should it be taught, and by whom, and how? And since not all substance can be taught, what part, if any, should be taught? The analysis of doctrine as an end in itself has been rejected, but few academic lawyers have even attempted to produce a rationale for depth legal studies which go beyond such an analytical framework. And underlying everything is the question of purpose: Why does the law school exist, and what is—or should be—its relationship with the worlds of practice and scholarship—not to mention with the "real" world?

To analyze any aspect of higher education is, at this stage in the fortunes of the universities, a highly vulnerable operation. To attempt to speculate about the problems and future of legal education—which is now almost synonymous with law schools—is doubly difficult. For it involves not only speculation about the future of higher education itself but also about the future of a profession, for all but the most extreme would concede that law schools are tied, however tenuously, to the practice of law. Indeed, in the history of the emergence of the American legal profession, and ultimately the American law schools, lie all the strengths and weaknesses of the present position.

As in so many utopias, or attempts at utopia, the early settlers fought hard against the idea of having lawyers at all. The minister in Massachusetts was content not only to guide his flock spiritually but also to serve as physician and lawyer. But "lawyer-jobs," as Karl Llewellyn was ultimately to christen them, have a habit of emerging and producing their own functionaries. By the end of the seventeenth century, in most of the populous colonies, a legal profession was developing; and by the middle of the eighteenth century the attorney in Boston, or the barrister in Virginia who had been trained at the Inns of Court, were members of clearly defined groups, both socially prominent and professionally competent. They survived the Revolution, after which training in London was supplanted by the establishment of proprietary law schools (the most famous of which was at Litchfield in Connecticut) and by the founding of chairs of law in established universities. Thus, although the typical working attorney picked up his law through apprenticeship, a reasonably systematic method of education gradually emerged to train the leaders of the profession. Indeed, as the eighteenth century gave way to the nineteenth, and as the proprietary schools were increasingly taken under the nominal umbrella of the universities, it seemed that the United States had developed a systematic liberal education for lawyers which England had increasingly failed to provide. But such an appearance was deceptive, for within a few years the phenomenon known as Jacksonian democracy had all but swept away this embryonic educational structure. Indeed, in some states, the very survival of the legal profession was in question.

No doubt much mythology survives in the tales of the excesses of the Jacksonian period. The legal magazines produced in Boston and Philadelphia during the 1830s and 1840s make it clear that whatever the fate of the profession in rural areas in those days, in the cities a well-established bar survived the period without major mishap or undue financial hardship. But it is true nevertheless that the law schools fell on hard times. The most illustrious school by far was Story's Harvard, but even there, despite pretensions, the law program amounted to little more than a well-organized few months of collective apprenticeship training. From the point of view of the traditional reformer, legal education, just a hundred years ago, was both unsatisfactory and unsanitary. Qualifications for practice were derisory where they were not nonexistent. The profession was at a lower ebb in public esteem than is customary even in the case of the legal profession. Not only was the concept of the liberal lawyer a fairly remote one, and not only was legal scholarship almost totally absent, but almost all kinds of institutional or even institutionalized legal education were missing. In contemporary terms, legal education was 99 percent clinical.

It was from out of these vague and academically undistinguished mists that modern American legal education was born in 1870 when Christopher Columbus Langdell refounded the Harvard Law School, and in so doing, many would say, refounded the American legal profession. It may well be that Langdell was the creature rather than the creator of his era in law. By 1870, professionalism was once again rising in the American learned professions. In medicine, it was presaged by vital scientific breakthroughs ranging from those in anesthetics to those in bacteriology. In law, the catalyst was industrialization. As the frontier slowly evaporated, the power of Wall, La Salle and Montgomery streets began to grow. The legal profession, although still predominantly rural or small town and although still mostly a cottage industry of single practitioners, found itself led by the emerging corporate-oriented firms.

The Harvard Law School, in fact, emerged contemporaneously with this country's major contribution to the legal profession—the corporate law firm. It also emerged at a time when a Germanic scientism was gripping the American universities and Harvard was developing graduate professional schools; Langdell sought a scientific approach to law which he found in the case method—a method which would allow his new full-time academic faculty to reconcile the irreconcilable appellate decisions and instruct a new generation of judges to avoid the deviations from doctrine which their predecessors had perpetrated. This the professors accomplished by pulling apart cases before an admiring and intrigued army of students who, at the end of the semester or year, were then subjected to rigorous examination. The training of the lawyer was in this sense scientific. It was liberal only in the sense that the training of the chemist was liberal.

Today's radical student leaders in the law schools vigorously claim there have been no changes in legal education since the 1870s, a claim which is patently absurd. If the charge, however, is that legal education is dominated by a Langdellian structure, then in that there is a far greater element of truth. For what happened in the years after 1870 is that the Harvard model came to dominate all the law schools in the country. Today, every law school, even the unaccredited night law school, uses some form of the casebook method of teaching; and since such casebooks almost invariably cover a multitude of jurisdictions, the emphasis is on process rather than substance. Throughout the hierarchy of law schools, from the most famous national ones to the most locally-oriented, it is the analysis of appellate decisions through case classes which takes pride of place. The skills developed in today's students tend to be substantially the same as those inculcated in the students of the 1870s largely because the structure of legal education has remained unchanged. Law teaching, no matter how differently the case method is used, is still predominantly a matter of a single professor dissecting innumerable cases before a class consisting of large numbers of students. To be sure, "cases" have given way to "cases and materials," problems have been added to appellate cases, and policy vies with law. But the structure built by Langdell is still visible. Indeed, the concepts of hours and credits and the organization of semesters and years give the impression that form has truly triumphed over content.

When one turns to substance, however, there is little that remains of the last century, despite the radicals' claims. It is true that the basic first-year courses are essentially those which Harvard devised by 1900—torts, contracts, procedure, criminal law, property, and constitutional law. But the usual second-year courses are those devised primarily at Chicago, Columbia and Yale, and mainly during the twenties and thirties—administrative law, taxes, corporations, antitrust, labor law. And increasingly the third year is a development of the Columbia and Harvard elective system (although *system* is in many ways a misnomer; like the British Empire the smorgasbord of seminars "developed in a fit of absence of mind"). Such generalizations inevitably distort the picture somewhat. No one can fairly say that there have not been significant changes in many law courses, despite the retention of familiar labels. The atmosphere of all law schools—both national and local—has changed significantly over the years, and especially during the last decade. The emphasis in legal research has shifted considerably. But there is considerable justification nonetheless in the indictment that the law schools are trapped in the structure of an earlier age.

The fact that curricula and teaching methods in the law schools are largely uniform is not, of itself, necessarily bad. Nobody expects medical schools to have vastly different curricula, and if the new medical schools like Brown and Pennsylvania State are experimenting with teaching methods and emphases, this is a very recent phenomenon. Medicine, however, has highly sophisticated arrangements for specialization after a basic medical school course, and has even escalated general practice to a specialist art. Law, for all practical purposes, has no specialist training, unless the radical students are right in claiming that the syllabus of all law schools is geared to the Wall Street model (something, interestingly enough, Wall Street lawyers would deny vigorously). But basically there is no standard lawyer. Lawyers perform vastly different functions—in private practice, in large and small firms, in large and small towns, in national and local government, in business, industry, labor and antipoverty legal services, not to mention politics of every shade and description. In this sense, there is no unitary bar. The question then is, can a monolithic educational approach be justified when the profession is pluralistic?

This raises the issue of whether, in an anti-elitist period, it is possible to suggest that similar institutions should serve different constituencies. Certainly the history of such attempts is not encouraging. After funding the Flexner Report, which was remarkably successful in raising the standards of medical schools by driving most of the bad ones out of business, the Carnegie Foundation for the Advancement of Teaching funded a series of parallel studies of law schools, under the direction of Alfred Reed. Reed's conclusions, though, were very different from Flexner's. He saw that law schools, like lawyers, performed very different functions; he thus pressed for a formalized hierarchy of law schools. But Reed's solution was ignored by the leaders of the profession who did not wish to believe that the bar was anything but unitary, and by the middle-grade law schools which thirsted to drive out the less good schools but wore their violently anti-elitist mask when they looked up to Harvard, Yale, Columbia and Chicago.

Indeed, just when (during the 1920s) Reed was suggesting a hierarchy of schools and, by implication, gradations within the legal profession, the professional organizations were busily attempting to standardize and elongate legal education. Raising the standards of legal education became synonymous with making it conform to those schools with the programs of longest duration. In brief, legal education just fifty years ago was a free-for-all. It was only between 1919 and 1923 that the two concerned professional trade unions—the American Bar Association (ABA) and the Association of American Law Schools (AALS)—sought to improve the education of lawyers through such devices as accreditation of law schools and the strengthening of state licensing regulations.

The process still moved slowly. By 1927 only four states required two years of college for students embarking on legal studies; one other required one year, and some seventeen more required only a high school education. The remainder had no requirements at all. And what was meant by law studies was remarkably casual. All the states appeared to provide a period of apprenticeship as an alternative to law school; and of the eighty-four three-year schools (there were still some one- and two-year schools), only three required graduation from college as a prerequisite for admission. (Many required only graduation from high school.) As a result, the vast bulk of lawyers who attended the best law schools in the country were practicing just five years after leaving high school, and a significant number saw little or nothing of college or, for that matter, of law school.

The contrast with 1970 could not be greater. Today all law schools are three-year affairs, although the surviving night schools (with roughly 20 percent of the students) provide a four-year part-time course. Only one state—Montana—still recognizes two years of law school as a qualification for taking the bar exam, but even there the profession is busily trying to raise the standard to three. All approved law schools require at least three years of college before a student may begin law studies, and most require a bachelor's degree. Further, the number of lawyers who enter the profession other than through a law school is minute. Indeed, except in a handful of states, admission through apprenticeship is virtually impossible, and in almost all those where it is, the bar is moving to stamp out such aberrations. As for the schools which are accredited neither by the ABA nor by the AALS, and which enroll some six thousand of the country's seventy thousand law students, most of them are in California where the state bar is contemplating giving students from approved schools significant advantages in the bar exam; obviously, such an arrangement would virtually drive the unapproved schools out of business.

All these things mean that legal education may well be "sanitized" during the 1970s. All schools will require the bachelor's degree for admission, all will provide three years of law school, and all will have those features beloved by accrediting committees—sixty thousand volumes in the library and a nucleus of full-time faculty. The most remote law school then will reflect the dream which Langdell had a hundred years ago. But will this dream satisfy the new generation of professors and students, let alone the needs of America in the 1970s?

In various ways the inherent conflicts in the law schools, which are the accident of history, are returning to haunt the 1970s. Consider legal scholarship. In many universities the law school is regarded, in the light of the caliber of research undertaken there, as little more than a trade school. Even the best university law schools have their problems: the intellectual ability of their faculties is rarely matched by a consummate scholarly output. Various reasons have been advanced. Until the last ten years, the production of teaching materials was regarded as a scholarly end in itself (and, happily for student relations if not for scholarship, prestige in law schools among both colleagues and students still normally depends more on teaching ability than scholarly reputation). Moreover, the faculty-student ratio at law schools is such that all members of the faculty are involved in teaching large classes, and the classes may well be elementary, or at least irrelevant to the professor's research interests; that, too, has a stunting effect on research. As one commentator has put it, scholarship and "Hessian training" may well be inherently antithetical.

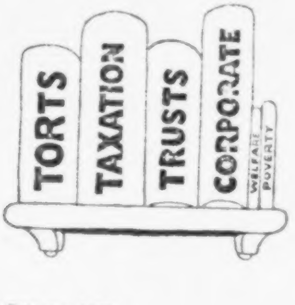
But there are intellectual, as well as administrative, reasons for the relative paucity of quality legal literature. The Realist movement in the 1930s, in addition to rendering pure doctrinal analysis out of favor, also threw doubt on the treatise as a scholarly form. There is no denying that distinguished work has been produced by many law professors, especially in the form of law review articles. But teaching, consulting and public service—the hallmarks of the professional school—have been the metier of the law professor, and not those activities which other disciplines regard as research. Thus, in the student view, while the law professor has defended the impartiality of the university and the right of scholars to indulge in objective research, he himself has often spent his non-teaching hours mesmerized by university administration or committed to partial and subjective activities outside the university. It is on such apparent dichotomies that student unrest thrives.

The inconsistent pressures are felt in many ways. Those who have participated in the hiring process at law schools know that, at least at the best-known (or most fashionable) schools, professional experience ranks relatively low among the characteristics sought in the prospective teacher of law. Success in practice and reputation among practitioners are nearly as unimportant as bar examination results; editorship of the law review at a leading school is worth more than a partnership in a leading firm. Producing a practitioner's treatise, however much prestige it brings in the profession, may well be the academic kiss of death. It is in this tradition that the leading academic members of the profession dismiss the bulk of law review articles of importance only to the practicing bar. For institutions known as *law* schools such a position may legitimately be regarded as inherently confusing.

What is it, then, that the academic lawyer can add to legal scholarship? As in the problem of attempting to define specialization, depth research in law has a nebulous ring. From the time of Columbia's experiments in the 1920s, designed to restructure the curriculum along functional lines, and

Yale's involvement in interdisciplinary research in the 1930s, the stock answer has been that serious legal research involves relating law to the social sciences. In this way it is suggested that the law professor is a multipurpose social scientist whose students will ultimately become multipurpose decision-makers. Many significant research strides have been made—in fields as diverse as criminal law and labor law—but such high-flown claims for law and lawyers run the danger of backfiring, and not solely because they greatly overstate the importance of the average lawyer. In short, while much technically competent and some academically significant work has been produced by academic lawyers, many of their most significant contributions have come in research which is only tenuously related to law, or indeed in activities which are totally outside the world of scholarship.

This strange vagueness about the nature of legal research, once it has wandered from the rigorous analysis of substantive legal principles, is also reflected in the attitudes toward teaching in the law schools. While Langdell introduced the case class as a means of teaching substantive rules of law systematically, the associated socratic method of teaching ultimately became a means whereby law professors and students were able to see the use of doctrine in action. The judicial process, the legal process, and so on, are now by default part of every law school course, as well as often justifying courses of their own. But the implications of this have not been carried through. As the case method has been appreciated more for its ability to teach method than substance, there is little evidence that law teachers have shown any enthusiasm for new breakthroughs in educational technology—programmed learning, for example—which might at least teach the students the elements of substantive law as painlessly and efficiently as possible. Some take the strange view that because there is now so much substantive law, the law schools should seek to teach none at all. Perhaps this should be expected in a profession whose literature (or its absence) suggests that law professors are either remarkably vague or largely inarticulate about the skills which law schools currently purport to develop, and, indeed, about the purposes for which such schools exist.



The slow metamorphosis through which the primary method of teaching law has gone has meant that law schools have not systematically attempted to teach the theory of law. The gradual "secularization" of American law has, with considerable intellectual justification, destroyed the idea of the legal system as a series of interrelated objective norms and replaced it so far with only fragmentary, if sometimes impressive, insights. Economists, of whatever school they may be, recognize some basic economic theory, despite the fact that they may attribute different values and importance to it. But few lawyers are prepared to discuss what law is or to expound a theory of law. Courses or seminars in jurisprudence are normally surveys of the various schools of legal philosophy. Indeed, the nearest thing to a course *about* law lies in the work of the linguistic philosophers who are concerned with law. Their work has frequently been derided as arid, but they are increasingly important at the national schools, and they may yet help bring together the world of scholarship and the law schools. In the meantime, the atomistic approach to the teaching of law only serves to underscore the lack of clear purpose in the modern American law school.

If faculties for the most part have been unable to come to grips with educational policy in the law schools, there is another constituency at work. At almost all schools, students are now active members of curriculum (and other) committees. Because of their perhaps undeserved and almost certainly oversold reputation for social commitment, the national schools, and increasingly the leading state schools, have attracted more than their share of radical students who are demanding a restructuring of the curriculum, as well as changes in all facets of school life, from admissions to governance. If there is one thing more than another which these students seek, it is to loosen the Langdellian grip on the law school. They seek relevance through poverty-urban-environment courses and through "action research"—by which they normally mean credit for work in legal services programs and, stimulated by an increasing number of black students, in community projects.

Yet if the typical faculty member is happy with the growth of new courses and new directions in the law curriculum, he frequently feels uneasy about the development of so-called clinical programs. To him it looks all too much like giving back the hard-won academic base of legal education to some not-so-thinly disguised office training. Talk of a clinical faculty along the lines of the medical schools causes even graver alarm. While most academics tend to favor the growth of programs involving closely supervised field research projects, clinical programs *per se* evoke a different, and negative, response. The history of academic law over the last hundred years has been that of a highly successful battle to wrest legal education from the profession and bring it within the university. Even the "liberal" professor cannot lightly accept what appears, in view of that history, to be a backward educational step.

A distaste for the prospect, however, will not make it go away, and money quickly overcomes reservations. The concept of clinical studies is heavily supported by the new CLEPR foundation (an acronym for Council on Legal Education for Professional Responsibility), and additional federal funds for its support have been authorized (though not yet appropriated) by Congress. Although many radical students view clinical work as a wedge to force the law schools to take positions on local or national political issues, a concept which the faculty fears would compromise the independence of the university, clinical programs nevertheless hold an attraction which other programs do not. The students' reluctance to express overwhelming enthusiasm for notions of specialization, empirical studies or other faculty suggestions stems at least in part from the fact that the bulk of the students are going to be practitioners of one sort or another, and therefore have limited interest in research *per se*. Clinical programs are viewed by most as an opportunity to become involved with the real world in a way which is only indirectly related to the regular syllabus. The pressure for clinical studies and the possibility of conflict with more traditional concepts of teaching and learning are thus likely to grow rather than decline.

The implications for the development of extensive clinical studies programs in the law schools are obvious. If such programs are taken seriously, in the sense that they are used to perform an educational function as well as to provide a social service, they will require a vast infusion of funds, in particular to produce the faculty-student ratio necessary for clinical teaching. They may also require a new kind of law teacher, one who is as much a practitioner—and at least in one sense an activist—as a teacher. According to opponents, this last development might well cause the law schools to lose their ability to attract a substantial proportion of the ablest lawyers, especially those with scholarly leanings, into regular teaching positions—a situation which already exists in many other common law countries. Even now, the pessimists claim that the intellectual caliber of prospective law teachers is falling, and that some of the abler young teachers are contemplating desertion. The radicals' demands, moreover, would take academic lawyers still further outside the university tradition. Legal scholarship—as used here—would be still scarcer; it might even disappear from the law schools altogether and become the responsibility of non-university research institutes, or perhaps of a department of the graduate school. In any event, the basic purposes of the law schools would be fuzzier still.

But if there is illogic in the position of faculty members who harbor these misgivings, the students are also caught in an inconsistency. Roughly speaking, the most radical demands are being made at the best-known (i.e., elitist) schools. Yet the bulk of the demands—closer faculty cooperation, work in the ghetto, individual research projects, and the abolition of the large class (once the prize of the law school and now thought increasingly to be abrasive and distortingly competitive)—would not only call for greater funds but would widen still more the gulf between the best and the mediocre schools, a gulf which would be further muddied, not bridged, by less competitive admissions. In short, the reforms being demanded could, ironically enough, make the profession and the law schools both more hierarchical and more elitist.

Thus once again one must ask basic questions. Do the law schools exist primarily to train lawyers? Do they owe their allegiance to the universities, to the profession—or to the public interest? The question has not been answered satisfactorily in the hundred years it has been around, and its implications remain considerable.

Take the issue of professional standards. Although society has rejected the classical economist's position that the market should determine standards, it has so far given only the vaguest answer to the question of who should test them. In the nineteenth century a "diploma privilege" emerged, so that in the 1890s a graduate of Yale was entitled to practice law in Connecticut without further examination, and the same was true for graduates of the University of Pennsylvania who wished to practice in that state. All this has changed, and today only five states allow diploma privileges, and then only for a limited number of schools. Yet the logic of this reform has never been fully implemented.

The test of professional competence in every state (with the five minor exceptions just noted) is the bar examination. The bar examinations are often not held in high repute, and understandably so; but instead of trying to improve them, both legal practitioners and academics seem more interested in developing more rigorous accreditation standards by which the less fashionable law schools, which often cater to minority groups and those unable to afford full-time education, may be driven out of business. The weakness of the bar examination has also encouraged some states to require the teaching of specific courses and to impose other educational limitations which prevent the better school from deviating too far from the structure of the run-of-the-mill schools, a state of affairs which also contributes to student and faculty discontent. The idea that law schools would be better if left free to develop along individual paths with widely varying curricula and differing specialties, while the public was protected against incompetent attorneys through rigorous bar examinations (and perhaps regular recertification of licensed practitioners), is a position which, despite its logic, is anathema to many leaders of the bar. They prefer three frustrating, albeit ineffective, methods of protecting standards—law school accreditation, required and recommended courses and bar examinations—to one effective one.

What of the future? The schizophrenia which afflicts the law schools today may come to the fore again in a growing movement to shorten law school to two years—at least for those students from good colleges. (*More* elitism.) The proponents of such a scheme argue something like this: 1) the case class and the socratic method of teaching are excellent for teaching a student methodology or to "think legally"— to acquire those cognitive skills which characterize the lawyer's craft—but today's better students acquire those skills within a year or eighteen months; 2) whereas traditional techniques are excellent for developing analytical skills, they are inefficient vehicles for imparting knowledge of substantive law and largely irrelevant for acquiring other legal skills, from drafting to negotiation; and 3) attempts to reform the third year by making it intellectually more stimulating so far have faltered because of student apathy, poor faculty-student ratios and faculty vagueness about specialization and depth research.

There is, moreover, an increasing amount of practical experience which supports these arguments in favor of a two-year law course. A recent study at Yale showed second-year students performing appreciably better than third-year students in the same course; in many schools, in fact, both second- and third-year students take demanding outside jobs which verge on full-time employment; California is toying with the idea of allowing students in accredited schools to take the bar exam after two years; and an increasing number of states are allowing third-year law students to appear in court, on their own, on behalf of indigent clients. If law students can work almost full-time or are allowed to appear in court on their own, is it not logical to consider dropping the third year of law school altogether for those students who have no research interest to keep them there longer?

Other would-be reformers advocate a two-year degree consisting, in essence, of the first two years of law school interspersed with programmed learning or an equally efficient method of acquiring "black letter" law, and followed perhaps by a period of quasi-apprenticeship. (Some would prefer a period of apprenticeship in lieu of the second year of law school.) The public could be protected by a tougher nationwide bar exam. But still the bulk of academics are unenthusiastic, and the typical practitioner is filled with nothing short of horror. One would imagine that the three-year law degree had been incorporated by Magna Carta rather than established in the 1930s as the result of the social and economic consequences of the Depression, and at a time when students were patently less prepared than they are today.

Some response, however, must be found for the bright student who, having survived twelve years of highly-structured primary and secondary education, sees another seven years of over-structured higher education facing him if he wants to be a lawyer or make use of legal skills. One possibility, still allowed by the regulations in many states and followed by a few law schools, is to admit students after three years of college. The opposition again seems formidable: colleges would fight to keep their best students through the senior year, and law schools would find it difficult to adjust their admissions when overwhelmed with over-qualified graduates from the colleges. But if the two-year law school proposal runs into its expected roadblocks, this exit from the present treadmill may be the only choice. Alternatively, there is an even more radical suggestion: two years of college coupled with two years of law school leading to a limited practicing certificate and followed by a two-year obligation to serve the poor. This plan was introduced as a bill in Congress last year by Representative Roman Pucinski as the basis for federal support of law schools, more to provoke thought than action, but it may be an important straw in the wind.

Certainly the prospect of federal funding is relevant for reform. Law schools *are* run on the cheap. Several nonaccredited schools are run at a profit, and even some accredited schools, especially those in the poorly-endowed private universities, covertly provide a subsidy for other parts of the university. But even where this is not so, the law school is still treated as what it historically was—a proprietary school franchised to use the name of a university. What other department at Harvard, for instance, would have an effective faculty of sixty for more than seventeen hundred students? A ratio of one to thirty would be unheard of in any reputable undergraduate institution and unthinkable in any other graduate department.

Simply to suggest that doubling or trebling law school faculties would at once make things twice or three times as good in terms of teaching and research is, of course, absurd. At the same time, the law teachers' journal, *The Journal of Legal Education*, is a graveyard of ideas which died or were stillborn because their authors never considered the traditional financial limitations on law schools. Moreover, it may well be that some of the weaknesses in legal scholarship could be blunted if the law schools would become more like the rest of the university. Almost certainly some of the law students' frustration and alienation could be lessened by a faculty-student ratio which allowed smaller classes, effective field research, properly supervised library research and new teaching techniques. Some new sources of funding, in other words, must be found if the law schools are to escape the trap in which they seem to be caught; but it is perhaps significant that the law schools have realized they are under-funded at the very moment the universities—especially the private ones—appear to be nearing financial crisis.

The most likely source of new funding, even for the private universities, is the federal government. Perhaps during the 1970s Congress will develop a federally underwritten educational bank or a national scholarship program based on GI Bill lines, if the hostility of state universities can be overcome. But if federal funds became available in any other form, they would be likely to help the weaker schools more than those which are most aware of the need for reform. This is no doubt eminently desirable in terms of the short-term national interest. But in terms of the long-term future of legal education, the greatest need might well be to encourage innovation in those schools which are capable of breaking the existing patterns, and those schools are, for the most part, not the weakest but the strongest.

Assuming the government is the most likely patron of legal education, it is not irrelevant to note that academic lawyers have shown themselves in the past to be miserable Washington lobbyists where their own interests are concerned. This in itself is an interesting reflection on the legal profession and legal education. Until the very last moment in each case, it looked as if the law schools would be left out of the National Endowment for the Humanities, the International Education Act and the proposed Institute for the Social Sciences. Lawyers have found it difficult to lobby because, among other things, they are unable to agree on what legal research is and whether it needs money, or to agree whether there are defects in law teaching as it now exists. The major exception—a recent attempt to establish a Law Foundation primarily with federal funds—went awry because it was regarded as favoring a particular approach to academic law. The result is that law schools are the least favored part of the university when it comes to federal money. To be sure, this has saved academic lawyers from some of the distasteful aftereffects which the acceptance

of federal money appears to have had in the hard and medical sciences—aftereffects ranging from empire-building to the undermining of academic independence. Nonetheless, the inability to agree on an approach to federal support is a significant aspect of the conflicts inherent in legal education.

At all times, one fact remains certain: The present inability to agree about the future shape of legal education is symptomatic of the fact that legal educators are increasingly uncertain about the validity of the assumptions on which they have relied for generations. At long last the idea of a unitary profession is being seriously questioned; the law schools are likely to be faced in the 1970s with a fragmentation of purpose which they will find hard to resist. At long last the mediocre mean, championed by the AALS, is under attack; the idea that all law schools should have the same function or the same emphasis is being questioned in the most fundamental way.

At the national schools, with their relatively strong financial and intellectual resources—and perhaps at others, too—there are rumblings of reform motivated at least in part by the feeling that unless they strike out along new paths, their days may be numbered. At most of the national schools, the third year has already fragmented into clusters of seminars and individual research projects, and even if the intellectual rationalization for such changes is far from clear, they are rapidly being accepted. Fragmentation of the second year may well follow, and indeed is under way. There is increasing talk of specialization, although often without an awareness of what is at stake. The boldest experiment so far—the Divisional Program at Yale—collapsed partly because its proponents were anxious not to describe or treat it for what it was, an experiment in specialization. But other schools have taken on the challenge. Pennsylvania has special programs in securities regulation and welfare law, Harvard is preeminent in international law and taxation, and so on.

Despite the lateness and the apparent conflict with articulated egalitarian goals, the most likely direction of development is diversity—a series of different models responsive to the various constituencies which all law schools in varying and inarticulate ways seek to serve. Some schools may seek to serve the existing profession, and for them little change would be necessary. As at present, some would be "big firm" and others would be "small firm" schools. They would look pretty much as many law schools look now. Their faculties would be involved in research primarily of a substantive nature, emphasizing those subjects and approaches of greatest value to the practicing bar. Scholarship in the tradition of doctrinal analysis thus would find an obvious home and a new respectability.

Other schools might seek to turn themselves primarily into skills-oriented institutions. As such, they would take a particular area of expertise—whether it be urban law or the environment—and develop a clinical program around that area of concentration. Such schools presumably would develop clinical faculties, much like those of medical schools, whose practitioner-teacher members would bring their professional skills to the classroom, and whose students would occasionally, perhaps regularly, leave the classroom to work in "the world" during the course of their law school careers. A new breadth would thereby be added to legal education, a breadth embarrassingly absent at present.

Still other schools might develop as policy-oriented institutions—that is, as law schools which might expect their graduates to contribute as much outside the law as in it. Such institutions would take on certain of the characteristics of the American schools of public administration or the English departments of social administration. These schools, although they would offer a core of professional subjects, would expend their main effort and measure most of their contribution in the value of legal skills in the realm of public and social policy.

Finally there might be a very few schools which essentially functioned as research institutes. Engaged in the kind of research which uses and teaches law in the framework of the social sciences and humanities, these schools would look much like the graduate schools in the other disciplines. They could expect, too, to develop the relatively low faculty-student ratios which exist in the graduate schools, and they could expect a large proportion of their graduates to go into teaching and research positions.

No one, of course, would expect all the law schools to reshape themselves neatly and quickly in the form of one of these four models, at least not in the foreseeable future. Some schools undoubtedly will serve two or more functions at once. The "substantive" and the "skills" models both emphasize professional aims, and the "policy" and "research" models are also closely linked. A few courageous, and affluent, schools might be able to handle even more than two objectives, but hopefully with a clear articulation of which they sought to serve, and how.

What is abundantly clear is that the law schools can no longer successfully serve all four (and perhaps more) constituencies, and that if they try they are likely to become increasingly vulnerable—to student politics, to faculty designs, to professional pressures, and to a range of influences which ultimately would alter them beyond recognition, and probably beyond utility.

Before succumbing to such persuasion, however, an optimist can detect the beginnings of reform. Stanford is about to experiment with a two-year degree, and other schools are moving extensively in the direction of curricular fragmentation. The PH.D.-J.D. degree is now available in a large number of schools. Northeastern is moving to a curriculum which calls for periods of practical experience in law offices, UCLA will give a quarter off for clinical work, while Hampshire College and Brandeis are said to be thinking of establishing law as an undergraduate major or as a department in the graduate school. At least a third of all the accredited schools have developed clinical programs, and even the idea of specialization has become almost respectable. New subjects have been tried in the first year at some schools, and at Michigan there is an effort to vary the teaching methods in the different first-year classes. Where these changes will lead is unclear. What *is* clear is that an increasing number of schools, pushed either by students or faculty, or both, seem destined to break out of the conformist mold which currently characterizes legal education. It is true that portents of such breakthroughs have appeared on the horizon before, only to dissipate at the moment of fruition. Things, however, are probably different today.

It would be wrong to minimize the difficulties. Even with the quickening pace of change in the universities, structural and curricular changes come slowly. Relying on his dual bases in the universities and the profession, the law professor has developed vested interests which sometimes savor of the eighteenth century's "parson's freehold." Certainly law faculties have only rarely shown the cohesiveness necessary for serious reforms in educational policy. The impact of the radical curricular reforms developed at Columbia in the late twenties had, within a decade, virtually evaporated; and in the sixties, mythology has it that curricular reform was most active at Denver, Iowa and Southern California, where the faculties were relatively small and relatively young. And even with the pressure from today's students, the well-known law schools will find reform difficult because no reform can effectively be imposed against the wishes of their distinguished faculties, while the lesser-known schools are frequently so beholden to the local bar that no reforms at all will be countenanced.

Much, in the long run, will depend on the students and their mood. It is increasingly clear at the national schools that some significant segment of the student body has no apparent interest in practicing law, at least not in the traditional sense. This alienation is now reaching both the leading state universities and some of the smaller private institutions. Ralph Nader has predicted that if the present trend continues, Wall Street will have to recruit at Cumberland Law School. The prospect is an intriguing one. It would mean that within a few years the more orthodox state universities and the lesser-known private schools would be the repository of the traditional concepts of law. The implications for the national schools are even more remarkable. If Chicago, Stanford and Pennsylvania are not institutions for producing lawyers, what are they?

Each few years someone shouts "wolf" and proceeds to pontificate about "the crisis in legal education." Each few years someone reinterprets the theme of integration of law and the social sciences as the salvation of the law schools. The outside world takes little note. University presidents find law schools harmless-enough institutions whose faculty members, provided they are well-paid and are allowed to pursue their outside interests, rarely bother them (except when a new dean is to be chosen), and can even be useful when he is looking for committee chairmen. And thus it was that the Carnegie Commission on Higher Education, charged with thinking deeply about the future of the universities and colleges in America, at least at its inception, planned to ignore legal education on the ground that it had no major academic or intellectual problems.

Perhaps we have called "wolf" too often. The fact that radical students and younger faculty members are now calling "wolf" may indeed prove nothing. Whatever the structure and content of legal education were, the present atmosphere in the country and on the campuses would demand a clamor for reform. Yet it is just possible that an alienated student body stumbling on an institution which has many myths and even more inconsistencies might stimulate the reevaluation which law schools have avoided for generations.

Professionalizing the Lawyer's Role As Counselor: Risk-Taking for Rewards

Andrew S. Watson, M.D.[*]

At this point in the development of legal education, any suggestion for broadening the curriculum must stand the vigorous test of relevance. Massive changes in technology and the burgeoning of social problems which must come under the scrutiny of legal institutions have once more faced us with the phenomenon of curriculum overload. It may therefore seem a curious time to renew pressure for incorporating skill-development into the law school curriculum. The well-established view that to seek such skills is to risk something akin to turning competent law students into pillars of salt may make the argument even less appealing. Despite these attitudes, however, it is more or less a settled fact that of necessity law schools must reach into these hitherto more or less undeveloped areas of study.

A major assumption in this paper will be that competent professional lawyers must be the possessors of considerable ability in "counseling." They must know how to deal with the people with whom they carry out their lawyer's work, and they must do it better than they have done in the recent past. I shall discuss in detail the rationale of this view. I will seek also to define precisely what this skill is, in order that we may discuss how it can be developed. Finally, I will delineate some of the means by which training for counseling skill may be incorporated into current law school curricula. Despite all of the logistical difficulties before us, I am firmly convinced that these changes may be made within the limitations of nearly all law schools. Indeed, I will argue that a failure to do so is to graduate our students into their law careers in a condition of considerable professional jeopardy.

---

[*] Professor of Law, Professor of Psychiatry, University of Michigan.

I. Why Counseling Skills?

The most pressing argument for including formal counseling training in legal education is that it relates to virtually every task a lawyer performs in his multiple roles. Whether he deals with the documented traces of earlier social and personal transactions or plans some complicated legal arrangement for the future, he must have the capacity to weigh and understand the human factors involved. A failure to do this effectively may lead him into endless blind and futile trails and confusing contradictions. In short, fact-gathering about people and their relationships forms the cornerstone for a lawyer's professional competence.

Whatever role a lawyer fulfills, he must be masterful in the art of communication. This entails understanding his own reactions to situations as well as the reactions of the persons with whom he communicates. A vast amount of information about this process is now available, but regrettably lawyers have made little deliberate use of it. It seems perfectly obvious that the explicit coverage of this information in law courses is long overdue.

Even though many new mechanical aids such as computerized case retrieval will inevitably be brought into law practice, the necessity for lawyer evaluation and interpretation of the "printout" to the people involved will always exist. It is most unlikely that any machine will ever be able to substitute for this skill. Some ratification of this is found in modern hospitals. There, as a result of the development of extensive new technical equipment, patients have often been left to fend for themselves emotionally. This has frequently resulted in their inappropriate withdrawal from the treatment process, and this has necessitated developing techniques for solidifying the doctor-patient relationship.

Similarly, the vast extension of substantive legal materials necessitates even greater communication skill in lawyers. Lawyers have always considered themselves excellent analysts and purveyors of information about virtually everything, and generally this has been true. However, there is an interesting paradox in regard to lawyer communication skill in relation to psychological material. All too frequently lawyers come into court profoundly ignorant of the psychological issues with which they are dealing. It would be easy to view this merely as poor preparation, but I interpret it as an unconscious resistance to dealing explicitly with such issues. This resistance relates to two principal forces. First is the human tendency to assume that because each of us has a psyche, we readily understand psychological matters. Second is the antithetical belief that to look into these matters at all is to open a Pandora's box with all of its incipient risks. Though neither of these propositions is true, acceptance of them creates a danger of poor performance by lawyers in the areas of counseling and dealing with interpersonal problems.

Yet another barrier interferes with communication facility between people. This relates to the multitude of cultural factors which influence communication. In the past, most lawyers have tended to work largely with middle class and upper class clients with whom they had good cultural rapport and consequently more or less automatic communication facility. In short, they "spoke the same language." The multitude of new legal programs, such as those sponsored by the Office of Economic Opportunity to open up neighborhood legal aid offices, will force lawyers to develop the ability to communicate across cultural lines. This absolutely necessitates lawyers learning new "languages" if their functions are to be effectively performed. It also, however, faces lawyers with the psychological hazards which are a part of the technical problems in counseling.

In addition, recent Supreme Court opinions such as *Miranda v. Arizona*[1] and *In re Gault*[2] now make it virtually mandatory that a lawyer-counselor understand the psychological nature of waiver as a technical issue. Mere verbal acquiescence does not satisfy the tests derived from these cases,[3] and this places a large and increasing burden upon lawyer counseling skills. While the precise meaning and psychological content of these tests is not yet developed, the requirements will surely be fleshed out in future cases in which there will be expert testimony upon the matter. This will be all to the good, for it provides another motive for lawyers to develop counseling skills. It will provide the same kind of advantage derived by the medical profession in the wake of developing pressures about "informed consent." The need for such consent has forced doctors to talk more extensively with patients, and this has had psychological value of its own to the doctor-patient relationship.

---

[1] 384 U.S. 436 (1966).

[2] 387 U.S. 1 (1966).

[3] *In re* Gault, 387 U.S. 1, 55 (1966):

> If counsel [*sic*] not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

One of the perennial arguments for excluding attempts to teach "skills" from law school curricula is that this matter is best left until the student enters law practice, at which point he may be taught the skills more effectively. I have argued elsewhere that this ignores the psychological realities of education.[4] Because lasting images are laid down in law school about *how* a lawyer functions, these matters cannot be put off until later without running the risk that students will be incapable of such maturational changes after they leave law school. For this reason alone, early introduction to these counseling skills must be made.

This all emphasizes the need for a pervasive approach to teaching the professional skill of counseling.[5] Every opportunity should be taken to relate it to a multitude of legal subjects. Although this will demand use of techniques new to most law teachers, Rutter, Brown, and others have demonstrated that the adjustment can be effectively made.[6]

II. WHAT IS "COUNSELING SKILL"?

Conventional materials for studying counseling (the literature of psychology, psychiatry and social work) articulately convey the theoretical content of our knowledge of counseling. Much of the important information on the subject is to be found under the rubric of "transference" and "countertransference" theory. These concepts were among the most important of Freud's contributions and relate to some of the ways in which our conscious and unconscious mind participates in the process of human interaction.[7] There is also a great deal of general theory about human behavior, the manner in which it develops and is patterned, and the way in which it influences the communication process.[8] The more one knows of this, the better one understands the counseling process. In addition, sociologists have made a substantial contribution to our knowledge about personal interaction with their concept of *role*. Roles, as they relate to lawyers, have been well elucidated by Probert and Brown.[9] Lawyers must not overlook the fact that roles involve what people expect of them and have little to do with what lawyers themselves may desire to do. A good example of this is the act of counseling, which people expect of lawyers whether or not lawyers know how to do it or feel it should be done.

---

[4] Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968).

[5] *See* Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment,"* 15 J. LEGAL ED. 435 (1963).

[6] *See, e.g.*, H. FREEMAN, LEGAL INTERVIEWING AND COUNSELING (1964); Brown, *Experimental Preventative Law Courses*, 18 J. LEGAL ED. 212 (1965); Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL ED. 301 (1961).

The body of theory has developed from studies conducted in a variety of ways. Probably the most effective indirect means for studying the theory of counseling is provided by films or television tapes. Here the actual process may be followed and commented upon by the teacher as fact and process are brought into juxtaposition in a highly instructive form. Use is also made of counseling demonstrations through one-way screens and sessions held in front of groups. Though it was thought formerly that these techniques were too disturbing to clients and patients, this notion has been largely dispelled by experience.

As helpful as these materials are, they are clearly inadequate to describe the full complexity of the counseling process. Reminiscent of Kazantzakis' comment that for ideas to be communicated effectively they must be danced,"[10] I fear that in the last analysis much that we learn about counseling must derive from actual experience in watching and participating in the process itself. But to do this effectively we must know what it is we are to watch for. The following comments are intended to set forth some idea of what it is that we seek when we talk about developing counseling skills. Essentially they attempt to describe some of the things which we would see an effective counselor doing if we were to watch him.

---

[7] A. WATSON, PSYCHIATRY FOR LAWYERS 4-9 (1968).

[8] *Id.* at ch. 5.

[9] Probert & Brown, *Theories and Practices in the Legal Profession*, 19 U. FLA. L. REV. 447 (1967).

[10] N. KAZANTZAKIS, ZORBA THE GREEK 290 (C. Wildman transl. 1953).

The most vital aspect of learning about counseling is to understand it as a dynamic process.[11] Its essence is the emotional interaction between the interviewer and his subject and the influence of this upon the ideas which they seek to exchange. It is an old adage often bandied about by lawyers that a good lawyer learns to operate without emotion. This is anathema to those working in the field of counseling, who believe that it is an absolutely moot question. Emotions exist whether they are wanted or not; the issue is not whether or not lawyers should have emotions, but rather, since they have emotions, what should lawyers do with them?

Every counseling situation implicitly requires maintenance of an optimal emotional distance between the parties involved. How much should an interviewer expose his own feelings? For what purpose and under what circumstances should he permit them to come into open visibility? How may he objectify these emotions when they do arise? In short, how may he utilize his intellect to handle the effects of his own emotions as well as those of his client? This obviously raises the second important aspect of understanding counseling: the problem of self-knowledge. None of the matters raised above can be handled adequately if the interviewer is not aware of his own sensations. Then and only then is he able to find the reasons for their presence. When a counselor has developed this skill, he possesses the best perceptive instrument available for understanding interpersonal relationships: his own reaction patterns as they reflect the emotional stimulation of others. Only then will he be in a position to "factor out" his contributions to the transaction. What kinds of emotions did he stimulate in his clients by the manner in which he spoke? How did his own typical response pattern modify the reactions of his client? What subject matter may potentially stir emotions which cause him to become blind to it? Awareness of these factors in conceptual terms as well as in explicit personal ways permits the counselor to perceive fully his contribution to counseling situations.

---

[11] A substantial amount of knowledge regarding the development of human behavior is also desirable. Several recent books are excellent sources of this information. Readings in Law and Psychiatry (R. Allen, E. Ferster & J. Rubin eds. 1968); J. Katz, J. Goldstein & A. Dershowitz, Psychoanalysis, Psychiatry and Law (1967), Watson, *supra* note 7.

Another set of counseling-process data which must be understood fully relates to the manner in which individuals communicate their feelings and ideas in interpersonal relationships. Though lawyers are very familiar with the niceties of verbal communication forms, they are generally unfamiliar with non-verbal communication.[12] It is now well-established that non-verbal communication cues are enormously important in human communication, just as they are in that of lower animals.[13] There are a great many non-verbal cues one may learn to perceive and explore. Raised eyebrows, skin-color changes, posture, body movements, and a myriad of other such signals have meaning which can be detected and utilized to understand more fully what is going on in the counseling process. There are many explicit techniques for changing these body cues into words which then help to clarify the counseling transaction. Lack of this skill may result in a lawyer misapprehending what is going on in the counseling relationship.

Another critical aspect of the counseling process relates to the sensations involving "privacy." While it is clear that when a client walks into a lawyer's office there has been a kind of "implied waiver" of his privacy, this does little or nothing to modify the client's feelings about his anticipated loss of privacy.

Clients, for example, will still have worries about how they appear to the counselor. They will have feelings about losing their "independence." They may have explicit fear about causing risk to themselves if they reveal certain things; this fear may not be entirely conscious. They may have a basic lack of trust about speaking freely to counsel. Finally, there may be open lying to the lawyer-counselor to serve particular personal interests of the client. Skillful interviewing must take these facts into account and deal with them. There are explicit skills for coping with these omnipresent sources of resistance to candor, and they may be learned in the context of the counseling process.

---

[12] This is notwithstanding their long recognition that words on the face of a transcript do not adequately describe what happened in the trial.

[13] Birdwhistell, *Background to Kinesics*, 13 ETC: A REV. OF GEN. SEMANTICS 10 (1955).

III. How Do We Develop Counseling Skills?

Though most of the "helping" professions have long utilized formal training for the development of counseling skills, lawyers have been left to learn them accidentally and through sheer intuition. Those unusual lawyers who have such intuitive skills have always done their work magnificently. However, such inherent skill is so rare that most lawyers have been severely handicapped by lack of counseling ability. The end result is that the average practitioner is markedly deficient in counseling competence. Whenever counseling becomes crucial to his task, he is in serious difficulties.

If this leads us to conclude that some form of training is necessary for law students, to whom may we turn for help with the training? Obviously, those best equipped to teach counseling skills are to be found in the professions which have made it a matter of professional concern to conceptualize and develop such skill. Let us examine these professionals group by group to see what assistance we can expect from them.

In my opinion psychodynamically-trained psychiatrists possess the most sophisticated skill in counseling-interviewing. This group includes psychoanalysts as well as other psychiatrists trained to that model of human interaction. They have long been aware of, and have intensively studied, the phenomenology of interpersonal transactions (which they call transference-countertransference). They have conducted many complex and sophisticated studies on the nature of this transaction and know how to teach the skills needed to deal with it.[14] It is commonplace for them to observe interview situations as well as records of interviews and to teach about the nature of such transactions. Explicitly, they know how to develop a counselor's sensitivity to the interview transaction. It is important to reemphasize that for the most part, only those psychiatrists with psychodynamic orientation will possess both knowledge about counseling and the ability to teach it. Obviously, there will be varying degrees of skill among these individuals and persons with clinical skill and teaching ability should be sought out for training tasks. As always, substantive knowledge is no substitute for active teaching and communication ability and involvement.

---

[14] *See, e.g.*, J. Frank, Persuasion and Healing (1961); Colby, *Experiment on the Effects of an Observer's Presence on the Imago System During Psychoanalytic Free-Association*, 5 Behavioral Science 216 (1960).

Another group that can be of great assistance in teaching law students and lawyers is found among the clinical psychologists. Here again one must distinguish different members of the group. Some clinical psychologists are primarily skilled in administering psychometric and projective tests and do not necessarily know about or understand the psychodynamic principles of open-ended interviewing (the stuff of counseling skill). As with psychiatrists, the critical characteristic to be sought is competence in the theory and skill of dealing with human behavior, especially as it applies to the interview-counseling situation, and a capacity to communicate effectively as a teacher.[15] Clinical psychologists who possess this skill have had training similar to that of the psychiatrists described above and are familiar with the subtle nuances of counseling situations.

Finally, one should consider the social work profession. This professional group also has a longstanding interest in the dynamics of the counseling relationship. There is voluminous social work literature on the subject, and some social workers have had long experience in being trained and in training for counseling skills. They know how to explore the psychological interaction of the counseling situation, and they know how to teach it. Here, too, it is necessary to make distinctions which have subtle relationships to the worker's theoretical orientation. Particularly, one must explore the individual practitioner's feelings about active involvement in training. It is my opinion that counseling training which is devoid of emotional interaction is far from being the most effective way to teach this skill. There are many professional images present in the field of social work (as well as the other counseling fields) which, when they exist, militate against the kind of active teaching involvement crucial to learning crucial aspects of counseling skills. These images relate to how active the teacher will be in the teaching process. Will he make interpretive comments about the process of the teaching situation? Will he see the teaching situation as an emotionally-charged transaction which is itself analogous to the counseling setting? Will he use this analogy for learning purposes? Concern over these attitudes must be fully exercised in selecting the trainers to be used in the law school setting. There is no avoiding the fact that the training orientation of law students and lawyers is such as to make them very aggressive interactors with their teachers. A teacher who does not have the capacity to engage himself comfortably in this kind of relationship will be swiftly discredited by his students and will become very uncomfortable himself.

---

[15] Many clinical psychologists have special training in group process techniques, which is discussed here in relation to the logistical problems of teaching. *See* S. SLAVSON, AN INTRODUCTION TO GROUP THERAPY (1943).

Now that we have identified our teaching group, let us consider how to perform the teaching mission in the law school setting. I have already mentioned that the most effective way to train for counseling skill is in individual supervisory sessions with a trainer. This is the principal and characteristic means utilized by those professions which emphasize the counseling-interviewing-treatment relationship. In their training, they spend literally hundreds of hours in individual sessions with their trainers. Obviously, although this may be the ideal method for learning, it will be impractical as a means for training law students if we are to reach them all.

A second traditional technique utilized by professionals for training in counseling skills is called the "continuous case seminar." In this situation, a student counselor-therapist presents to the student study group the detailed accounts of the ongoing interview sessions with his patient or client. These are used as the instructional vehicle to explore the principles of counseling by the whole group. Needless to say, the person presenting the case gets the best learning experience, but the whole group profits extensively. This method is readily adaptable to the law school setting. Detailed presentation of cases handled in legal aid offices or defender programs could be made the subject of classroom presentation and would emphasize counseling problems as well as legal problems. This would provide an ideal way for joining a law teacher and a counseling teacher in a collaborative teaching effort. Each could utilize the material presented to emphasize the contributions of his respective profession, and there would be a constant and ongoing integrative process. Similarly, this technique could be used to explore many other kinds of lawyer activities which also contain the essential psychological ingredients of the counseling relationship, such as examination and cross-examination procedures. In these teaching situations a good counseling instructor can anticipate and predict what is coming up in the material of the interview or examination situation. The very fact that he makes predictions provides some validation for the principles being taught. This latter point is an important aspect of the learning experience. It takes counseling students a very long time to become convinced that the subtle transactional cues may actually be relied upon as "hard" data. This can only be learned by multiple and ongoing confrontations.

Let us turn to some of the explicit ways in which we could introduce counseling teaching into contemporary law school situations. The ideal situation for teaching counseling in the law school, provided it is available to all students, is the legal aid and defender clinic programs. These settings involve real people with real problems in real counseling situations. Interview data can be recorded as conventional notes kept by counselor-lawyers or on tape recordings (or with video-tapes in the more affluent settings), which then become the focus for detailed study by the student group in its learning process.[16] This comes very close to the traditional learning techniques described above and is totally related to reality. The counseling instructor can observe the student in his work, and it would not be difficult to set up situations where whole classes could observe the interview situation from behind a one-way mirror. The counseling process can be discussed by the teacher even as it is unfolding. Of course, lawyers will immediately wonder about client privacy in this situation. From experience in medical education, I can say categorically that this problem is easily handled with the patient-client by merely explaining the educational circumstances. Clients usually identify themselves with the teaching situation and may even get satisfaction from their participation in the training process. This becomes one part of the client's *quid pro quo* for the legal services he obtains at relatively low cost to himself. Such has been the procedure in medical training centers for a very long time now. When properly handled (itself a piece of the learning experience for counseling), it poses no problem.

---

[16] This procedure is currently being used by Levy and others.

Other strategies for utilizing legal aid clinics for counseling training can no doubt be developed. There can be group discussion about observed interviews, group discussions of records from interviews, individual supervision of specific interviews, and many variations upon these basic approaches. The aim will always be the same: to develop sensitivity in the student-counselor about the transactional cues involved, the interpersonal communication process. The goal is not therapeutic skill but rather communication skill.[17] The group will be taught to observe consciously the subtle nuances of language which are evidence of unstated or unidentified desires, fears, or hopes. Attention will be constantly directed to the non-verbal aspects of the communication. Learning will be directed toward the ways in which counselor and client tell each other what they are thinging or feeling through non-verbal cues. For example, when a sensitive subject arises in the conversation and the client suddenly turns away, the student-counselor will learn how to utilize this observation as a means for helping his client regain ease by acknowledging the presence of discomfort. Traditionally, human beings tend to face this sort of thing by making reassuring remarks like, "Don't worry" or "There is nothing to be uncomfortable about." Psychologically, these remarks are anything but reassuring. In fact, such remarks communicate that the client's feelings obviously have not been understood and the counselor is discredited in the mind of the client. The alternative tactic of saying, "You appear to be uncomfortable while talking about this," signals that the counselor is aware of the difficulties the client is having, and, at the same time, signifies that the counselor accepts and will not be critical of the discomfort. This is the kind of explicit skill, paradoxical in relation to usual social tactics, which must be gained by counselors. These kinds of experiences, repeated dozens of times, provide the means for learning this skill. Just as law students must analyze a multitude of cases to learn the lawyer's logical skills, so they must have opportunity to experience this kind of situation frequently in order to master it.

---

[17] Of course, this skill is the first step in a therapeutic process. Effective legal counselors and psychotherapists must both possess communication competence; this is why good therapists should be sought as teachers.

This experience with situations appropriate to development of counseling skills must begin early enough in the law school curriculum to impress upon the student body the faculty's recognition of its importance. Ideally it would be introduced at the beginning of the student's legal education. This is not often possible, however. Students will not ordinarily encounter clinical activities early in their law school careers because until they develop a knowledge of substantive law they lack the legal sophistication to be effective in such programs. Moreover, many schools do not have the extensive legal aid programs necessary to expose all their students to the type of experience I have been discussing. For these reasons, we must consider methods for teaching these skills that can be carried out in more conventional law school settings and in the early portions of the curriculum.

One of the best ways this can be done is by utilizing the group-transactional process of the Socratic classroom situation. Students in a classroom, buffeted about by the stresses generated by the Socratic technique, provide ample data for use in counseling training. Obviously this kind of teaching requires a more specialized kind of counseling teacher than the more familiar situation of the clinics. Here professionals with additional competence in "group therapy" or "group dynamics" are needed. Indeed, a teacher who is not willing to see and deal with the group's emotional reactions as transactional data will not be able to carry this out. Many superb individual counselor-therapists feel ill at ease in the group situation and therefore would not make good teachers there. On the other hand, there are many who have considerable experience with this and know how to do it. It is clearly worth our while to examine these group methods in some detail.

As I have stated in other places, there is a plethora of emotional interaction in the Socratic dialogue of the well-tempered law class.[18]

---

[18] Watson, *Reflections on the Teaching of Criminal Law*, 37 U. DET. L.J. 701

There is massive evidence that students go through the same kinds of emotional reactions in the classroom that clients do in the counseling situation. Direct analogies may be made between these affective transactional responses and the interviewing situation. Similarly, teachers invoke and deploy the same transactional psychological forces which interviewers and counselors do in their more individualized work setting. All of this material may become grist for the mill of counseling education.

I have done this kind of teaching for many years now in law classes dealing with such diverse subjects as criminal law, family law, evidence, procedure, and even patent law. I have stated provocatively that I can walk into any law classroom dealing with any subject and within a few minutes proceed to demonstrate these psychological forces at work. Just as emotions distort and often disrupt counseling situations, so they affect the intellectual processes of the classroom. It has been my contention that not only will this method teach law students about the substance and process of counseling situations, but it will also improve their academic performance by alleviating some of the irrational impediments to the use of logic in the classroom situation. This too is parallel to the counseling situation, where the counselor seeks to put his client at ease so that they may together work out a rational solution to the legal problem at hand.

The precise way in which this is carried out almost defies verbal description. Sufficient detail to account for all of the forces present (especially to the critical eye of a behavioral scientist, sophisticated in the complexities of this kind of interaction) would make a description prohibitively long. Obviously the best way to describe the technique is through demonstration. I recently had the opportunity to do this in a movie made through the joint auspices of the University of Miami Law School and the Association of American Law Schools' Committee on Education. Those who would like to see this "dance" in some detail may do so through that medium. For now, let me give a short description of an opening intervention, typical of nearly all situations where group process will be

---

(1960); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968).

studied by this approach.

Seated in the front row of the class, I wait until a student makes a remark which signals to me that he has some underlying attitude which is being hidden from view but is slightly revealed by an imperfect grammatical structure or some manifest symptom of discomfort. I then stand and ask the student what he meant when he used the unusual phrase. This immediately injects into the transaction a new vector of psychological force. As an authority figure, I am confronting the student with a demand to perform and to perform in an area where he has already demonstrated discomfort. This new source of anxiety will cause the student to react adaptively in some fashion. He may blush, squirm in his seat, go excessively flat-faced, or deny that he said what he said. I will pursue him relentlessly for explanation. This adds to his difficulty. By this time, others in the class will be empathically uncomfortable about their colleague's plight. As I question him, I watch for signs of this response in others. When I judge that the student being questioned has gone as far as he can, I will then ask one of the empathizers to explain to me why *he* appears uncomfortable. This, too, is done brusquely. The new person, now one step removed from the primary stress, will probably be able to go a slight bit further along toward describing his reaction to my pressure (not to the original attitude disguised by the first student). However, he is still too close to the heat to succeed completely and so while I question him in this stressful manner (my face as devoid of feeling as I can make it), I watch the class for further reactions. Almost inevitably by this time somebody in the room has perceived what I am doing psychologically to the students I am questioning. Since he understands my "game" he will respond to this awareness by smiling. After I have carried student number two as far as he can go, I turn to the smiler and, still without expression, ask, "What are *you* grinning about?" He will respond with something akin to, "Why, at what you are doing!"

"What do you think I am doing?"

"Why, what you are doing to the students!"

"What *am* I doing to them?"

"You are making them uncomfortable and they get mad."

At this point I burst into a smile. This is not feigned, but is an expression of my personal pleasure at the fact that they have succeeded. It is also my facial expression which communicates that I am not unhappy about what has happened. I then say, "Why, of course!" The smiling student is asked why his colleagues were unable to tell me of their anger when I had asked them about it. He very comfortably responds that because I am the teacher and thus the authority, they are afraid to tell me about it. I compliment him on his awareness and then go back along the sequence of students in reverse order. First, I ask number two if this is correct, making the aside remark that I could place this pressure on virtually anybody in the room and get the same results. He is usually able to confirm the suggestion and readily comment about his own behavior, and freely does so. I then go back to number one for the same response.

At that point I make some general comments about the transaction we have all witnessed. I note that it is a commonplace human reaction to pressure, a response of self-protective anger in response to threats. However, most of us are not free to express this fully when we deal with people whom we fear or upon whom we are in some way dependent. I then analogize this to what happens in a lawyer's office every time a person comes into it. Since the lawyer is the authority and since he will be asking questions of the client which make him uncomfortable, the interview will always generate some anger and resentment in the client even when the client sincerely wants the lawyer's help. This forces the lawyer to learn how to deal with such emotions in order to free client responses and illuminate the matters he seeks to explore. I note how accurately and skillfully everybody in the class had been able to read the reactions of student number one. I comment that the only difference between them and me so far as skill is concerned is that I believed and thought about what I saw, while they tended to react more or less unconsciously. The students are then told that we will be spending considerable time during the course paying heed to these kinds of transactions. I urge them to constantly watch for these non-verbal cues in their colleagues and to try to think what they might mean. We will have many occasions where we will be able to ratify our hunches by exploring them in the same manner which we will have just followed. The class then proceeds and I sit down.

This typifies the kind of classroom transactions which can be used to teach counseling techniques. The first level of "resistance" to exploration (a technical term of counseling theory) and the imposition of my authoritative pressure upon the student was used as a vehicle to understand the effects of authority in an interview situation. It led to comments about the nature of psychological defensiveness, the way in which we try to ward off the expression of emotions which we think are forbidden, and the ultimate impossibility of really hiding them. While these factors will arise in a multitude of situations during the course, the unfolding process will always be about the same. Following a semester of this (and in some degree related to the frequency of such explorations), the students become more free and open in their communicativeness. This too is analogized to the process of helping clients become comfortable in the counseling-communication situation.

This kind of technique can be utilized in the context of any law course. It is, however, much more effective in courses whose content lends itself to psychological exploration. This means that subjects like family law, juvenile court law, criminal law, and the law of evidence are more productive than some of the business courses which turn on more abstract considerations.

Another point at which counseling training may take place is in moot court trials. Here the transactions of the examination and cross-examination process can be similarly interpreted and studied. Though the applicable procedural rules have the effect of considerably limiting freedom of expression, mock trials are nevertheless reality-based lawyer circumstances in which transactions may be understood as an emotional-rational process and analogized to lawyer-counselor roles.

No doubt an imaginative teacher can think of many other circumstances in which such techniques could be used. There has been considerable ingenuity demonstrated in recent years in some of the projects supported by the National Council of Juvenile Court Judges Training Grants as well as the legal aid clinic programs under the guidance of Professor Howard Sacks.[19]

One of the problems which will be raised by teachers is the matter of evaluating student performance in these circumstances. Thus far I, myself, have made no effort to test students upon their learning about these processes. While final examination questions have been tailored to include some aspects of these concepts, no explicit grading techniques were utilized. Recently, however, I had the opportunity to examine some procedures developed by Professor Louis Brown of the University of Southern California Law School for testing student learning in these areas. They appear so attractive I would like to mention them.

Professor Brown has devised two very ingenious methods for introducing psychological reality into the examination process. In the first technique, he utilizes sequenced questions which the student answers *seriatim* and without reference to his prior responses. The first question is handed out, the answer is written, and the student hands it in. The student then receives the second question which modifies the facts of the first, and he is asked to respond to it. When this is turned in, he is given the third question which further alters the circumstances. Once more he responds. Through this procedure, shifting realities in the lawyer-client relationship are presented for response, and the process elicits the kinds of reactions a lawyer would have in real life situations. It permits the examiner to observe and even grade the sequenced reaction patterns of the student.

In the second technique, a detailed description of an interview situation is presented. The student is then asked to rewrite the interview, giving his questions and the client's responses as he would attempt to elicit them. This makes the student analyze the significant psychological elements related to the legal fact situation in the original question. He must then appropriately explore the matter using lawyer counseling techniques in order to carry out his function. I have had the opportunity to read several of the answers elicited by his examination technique, and I am firmly convinced that it is a highly practicable way for measuring the teaching effectiveness of these kinds of materials. Professor Brown's methods deserve wide emulation, and I trust that he will provide us with a more complete published description of them.

---

[19] Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. Legal Ed. 316 (1959); Sacks, *Talking with Clients*, 13 Student Lawyer 14 (Dec. 1967).

* * *

I hope that these brief remarks have demonstrated the need to develop counseling skills, the nature of the skills we wish to develop, and some of the means by which they could be taught in traditional law classes as well as in newly developing situations. New schools should meet the challenge by leaping into these new areas of professional concern so that the more elderly and conservative institutions will have to take some lessons from them. Indeed, it seems to me that the most pressing obligation which the young have for the old is to force them to update their knowledge and come into harmony with the new and the contemporaneous. This is the only way that the aged can remain young.

DENVER LAW JOURNAL

VOLUME 45 SUMMER 1968 NUMBER 3

BEHAVIORAL PSYCHOLOGY: SPRINGBOARD FOR IMAGINATIVE LEGAL EDUCATORS

BY CHARLES D. KELSO*

Dean Kelso's theme is that (1) the civilizing of law and of society, as well as the improvement of education, are marked by increased reliance on the reinforcement of desirable behavior, and by a decline in reliance on punishment as a means of influencing behavior; and that (2) one of the most important challenges facing society and the educational world is to generate the perspectives, environments, communications systems, research, and organizations needed fully to explore and facilitate the above developments. In many ways, present day legal education operates as if teachers were already consciously applying the principles of behavioral psychology. Nevertheless, a deliberate attempt to incorporate behavioral principles should result not only in more effective classroom methodology, but more significantly in the curricular reform necessary for legal education to be relevant to its societal setting.

I. THE DEVELOPMENT OF BEHAVIORAL PSYCHOLOGY AND ITS EDUCATIONAL TECHNOLOGY

A. *Prologue on the Past*

A LAW professor, searching philosophy and psychology for insights into the learning process, can find many budless branches on those disciplines' family trees.[1] For example, Aristotle defined "knowing" as a capacity to actualize pure forms.[2] Unfortunately, this

---

*Associate Dean, University of Miami School of Law. This article was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

[1] There is little evidence that law professors have yet done much searching for inspiration in the psychological forest. Professor Cowen looked at the trees, but found no buds at all, except in psychoanalysis "Academic psychology is almost totally irrelevant for law. This is also a sad state of affairs and a cruel [illegible] a student of jurisprudence who had hoped that the new science [illegible] revolutionize law. It has not happened." Cowen, *Notes on the Teaching of Jurisprudence*, 15 J. Legal Ed. 1, 21 ([illegible]). [illegible] Professor Cowen overlooked some [illegible] contemporary learning theorists have [illegible] with the ways [illegible] which our present educational methods appear to [illegible] consistent with [illegible] Kelso, *Science and our Teaching Methods* [illegible] 13 J. Legal Ed. 183 (1960). The present article [illegible] what [illegible] promising theory of behavior, that of Professor B. F. Skinner, [illegible] and its associated technology [illegible] law school [illegible] See B. F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953) and [illegible] VERBAL BEHAVIOR (1957). A very readable overview [illegible] history [illegible] R. WATSON, THE GREAT PSYCHOLOGISTS FROM ARISTOTLE TO FREUD ([illegible]).

[2] R. WATSON, *supra* note 1, at 65.

FILMED FROM BEST AVAILABLE COPY

does not even squint toward the classroom. Descartes' "I think, therefore I am," rings true.[3] However, educators prefer to ask, "You are, therefore why don't you think?" Freud discovered sex's ubiquity.[4] Unfortunately, he focused on couches, not curricula. Pavlov switched from sex to reflex.[5] However, most law students are easily distinguished from Pavlov's salivating dogs.

In the Twenties, psychologists probed the unconscious mind's seething labryinths.[6] Law professors, happily ignoring the id, juggled cases and blue books. Meanwhile, psychologist Sidney Pressey, at Ohio State, played with a little multiple choice machine.[7] It recorded responses to questions and immediately informed users whether they were right or wrong. The device did not look like the beginning of a billon dollar industry. Pressey went other ways. The world of legal education took little note.

Mutual disinterest might have continued indefinitely. However, the wackiest missile of World War II fused an educational explosion.

B. *Breakthrough*

It started when Professor B. F. Skinner was challenged to transform several squadrons of peace loving pigeons into expert Kamikazi fliers.[8] Three pigeons, taught to look at warships, were to be harnessed in the windowed nose cone of a missile. Their head movements would control tail fin adjustment. A majority "vote" of the winged warriors would keep the missile on target.

Skinner trained his birds by rewarding them immediately with a bit of food whenever they emitted responses approximating the behavior of looking at models or pictures of warships. "Looking" behavior grew stronger and stronger. As it did, Skinner gradually narrowed the tolerance between a rewarded good look (head aimed right at the target) and an unrewarded off-target glance. Also, the pigeons gradually had to do much more shipwatching to earn their seed.

---

[3] DESCARTES' DISCOURSE ON METHOD pt IV (A. Wollaston ed. 1960), *reprinted in* R. WATSON, *supra* note 1, at 144.

[4] *See* S. FREUD, THREE ESSAYS ON SEXUALITY (1953).

[5] A thorough analysis is presented in B.F. SKINNER, *Two Types of Conditioned Reflex and a Pseudo-Type*, in CUMULATIVE RECORD 367 (1959). *See also* I. PAVLOV, CONDITIONED REFLEXES (1927).

[6] R. WATSON, *supra* note 1, at 123-95.

[7] Pressey's work is described in Skinner, *Teaching Machines*, 128 SCIENCE 969 (1958), *reprinted in* A. LUMSDAINE & R. GLASER, TEACHING MACHINES AND PROGRAMMED LEARNING 137 (1960). Study of this article is a [illegible] for anyone who would venture into programming.

[8] The full study appears in B.F. SKINNER, *Pigeons in a Pelican*, in CUMULATIVE RECORD 426-41 (1959).

Ultimately, shipwatching was about all that hungry birds did. In conventional terms, the birds had learned to "like" shipwatching, or were "motivated" to watch ships. Speaking strictly in terms of observable variables, the birds increasingly engaged in watching behavior after such behavior had been reinforced.

Speaking even more precisely of the birds' history of reinforcement during their training program:

(1) The birds initially were reinforced for "looking" behavior on a continuous schedule of reinforcement (*i.e.*, every approximately correct response was followed by food).

(2) Gradually they were shifted to an intermittent schedule (*i.e.*, only some of their correct responses were reinforced).

(3) The standards for acceptable behavior (*i.e.*, behavior that would be followed by reinforcement) gradually were raised.

(4) The pigeons were never punished for behavior incompatible with looking behavior.

It is apparent that Skinner's birds were not actualizing pure forms. Nor were they reasoning from an "I think" proposition, or coveting warships as sex symbols. Pavlovians might be tempted to regard the strong looking behavior as a conditioned reflex. However, conditioning a reflex requires the repetitive presentation of a neutral stimulus together with one which naturally elicits the reflex response.[9] For example, Pavlov paired the ringing of a bell with the presentation of food. After many repetitions, his dogs salivated when the bell rang even though food was not present.

In contrast, Skinner's trainees were presented with a neutral stimulus (a view of a ship), were given the opportunity to respond, and were reinforced with food whenever their behavior approximated looking at the ship. Nowhere in the Skinner pattern was a stimulus used which elicited a reflex response.

The war ended before Skinner's squadron saw action. However, he used excess pigeon time and energy teaching some of his charges to walk figure eights, play ping pong, distinguish colors, and so on. Later, Skinner turned to quite carefully controlled and quantified experiments to determine the relationships between various schedules of reinforcement and resulting patterns of behavior.[10]

Skinner's experiments produced opportunities for observing many systematic relationships.[11] For example, the more promptly reinforcement follows a response, the more quickly will behavior change. Reinforcement on a continuous schedule (every response reinforced) produces rapid initial learning. If behavior is never reinforced, gradually it will be extinguished — it will cease to be emitted. If reinforcement occurs only after a certain number of responses have been emitted, there is a rising curve of activity as the reinforcing event is neared, followed by a lull. The greatest resistance to extinction, that is, the highest number of unreinforced responses, occurs if reinforcement has gradually been moved from a continuous schedule to an intermittent schedule which does not follow a definite pattern. (For a human analogy, consider the behavior of a person who wins his first few bets at the races or at a one-arm bandit, and thereafter, over the years, wins from time to time.)

---

[9] *See* B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 45-58 (1953). For a more technical discussion see B.F. SKINNER, *supra* note 5, at 367.

[10] These experiments are most thoroughly documented in B.F. SKINNER & C. FERSTER, SCHEDULES OF REINFORCEMENT (1957).

As previously mentioned, Skinner discovered that responses not followed by reinforcement (either on a continuous or intermittent schedule) gradually are extinguished. However, following a response with the presentation of an aversive stimulus — punishing the response — does not extinguish behavior any more rapidly than simply not following the behavior with reinforcement. Again, to present a simple example, it may be more effective to ignore a nagging child than attempting to suppress the behavior. Indeed, the child probably nags only because such behavior has been reinforced in the past. Far better it would be to reinforce those occasions when a child uses acceptable behavior to communicate a desire.

Though punishment was not observed to be effective in extinguishing behavior, Skinner found that it did have definite effects.[12] Initially it resulted in emotional responses that could interfere with future learning, because the entire situation became somewhat aversive, and it produced unpredictable patterns of avoidance behavior. Later, when the aversive emotions gradually subsided, the punished behavior re-emerged unless in the meantime stronger behavior, incompatible with the punished behavior, had been created by the discriminative use of reinforcement. For an example, consider the alcoholic who has learned to call Alcoholics Anonymous rather than search for a bottle.

Why is Skinner's work such a tremendous breakthrough? The answer is that, unlike previous psychological paradigms, each critical variable in the systematic relationships discovered by Skinner was [illegible] can be observed directly. Thus, Skinner had no need to invent [illegible] hypothetical entities such as pure forms, traits, mental faculties, egos or ids. Further, not only can the pertinent responses be observed, but also, and perhaps more important, the two most important controlling variables (stimulus presentation and reinforcement) can be manipulated by the experimenter.

---

[11] These relationships are technically described in B.F. SKINNER & C. FERSTER, *supra* note 10, but they are explained in a much more readable fashion in B.F. SKINNER, [illegible]

[12] B.F. SKINNER & C. FERSTER, *supra* note 10, at 182-93.

Since Skinner's work with animals has been replicated on humans with similar results,[13] and since a teacher occupies in the school a role somewhat analogous to the experimenter in the laboratory, we now have the basis for a technology of education. Further, since we now have an analysis of behavior relevant to all actions of all men, we have the premises for synthesizing our notions about the economic man, the political man, and the law abiding or the law breaking man. Finally, and possibly most important to jurisprudes and to lawyers concerned about community problems and social reform, we have a solid basis for analyzing the human aspects of legal problems. Thus, we are in a better position for proposing solutions than were the Benthamites, who accomplished so much in the 19th century through applying a less scientific psychology (men seek pleasure and avoid pain).[14]

However, before taking off into the blue yonder of solving world problems, let us begin with the groundwork — the technology of education. The stage may be set for its investigation by providing a somewhat oversimplified list of the technology's specifications:

(1) Provide students with many opportunities to respond actively.

(2) Reward correct responses (or responses which approximate correctness) first on a continuous basis, and then intermittently, as standards for performance gradually are raised.

(3) Do not punish erroneous responses; plan instead so to structure educational situations that correct behavior is observed and promptly reinforced.

(4) Work toward the creation of an educational environment which provides automatic or self-reinforcement. Reinforce students for manipulating variables in problem-solving behavior so that mastery over manipulable variables becomes itself one of the rewards for problem-solving behavior.[15]

---

[13] Much of the work is reported in W. SCHRAMM, THE RESEARCH ON PROGRAMMED INSTRUCTION, AN ANNOTATED BIBLIOGRAPHY (U.S. Dep't of Health, Education and Welfare Bull. No. 35, 1961).

[14] For a quick summary of the major definitions and tenets in the theory of utilitarianism see J. BENTHAM, THE THEORY OF LEGISLATION 1-13 (1950).

[15] If one reinforcer, such as praise for manipulating variables, is frequently paired with another, such as an awareness of gaining mastery over the variables, the second becomes a conditioned reinforcer by much the same process that transformed Pavlov's bell into a stimulus for salivation. *See* B.F. SKINNER, *supra* note 9, at 76-81.

C. *First Steps in the New World*

If a teacher decides to apply Dr. Skinner's prescription, how does he do it?

First, students must be provided with many opportunities for responding in some observable manner to problems and questions. Much more difficult (indeed, probably the most difficult problem in conforming educational experience to Skinnerian specifications), is to supply reinforcement on schedule. Fortunately, a very slight reinforcement at the proper time may have a great effect in changing behavior. For example, Skinner hypothesized that immediately learning whether one's response is correct can be a sufficient reinforcement to carry a person through a long series of educational challenges, at least if the learning situation is reasonably free of aversive properties.[16] (Recall the temptation to keep going on a crossword puzzle when a "down" word provides assurance than an "across" word is appropriate.)

Perhaps the best way of eliminating punishment from an educational situation is to sequence the presentation of information and questions so that most responses are correct. This provides maximum opportunity for reinforcement on a planned schedule.

To test the basic characteristics of the technology suggested by his experiments and observations (sequence stimuli, observe active responses, apply discriminative reinforcement), Skinner invented programmed instruction. His first program presented vocabulary, principles, and applications of introductory psychology in a sequence of small statements, called frames.[17] Each frame contained a problematic stimulus, to which the student composed a response. The second part of each frame contained a suggested response, concealed from the student until he had first recorded his response. Usually a student was asked to respond to new material for the first time while it was still in the frame before him. Later he was asked to apply that material when it was not in view.

Skinner's program contained frequent review. However, his review frames were not merely repetition. To strengthen new behavior, Skinner called for applications in many different contexts, much as a law professor does when he has a student compare one case with others, or discuss its relation to hypothetical cases, asking the student to act as advocate, counselor, or judge.

---

[16] B.F. SKINNER, *supra* note 9, at 9-10. W. SCHRAMM, *supra* note 13, at 10-11, reports that "[t]he majority of the studies support the idea that immediate knowledge of results contributes to learning . . . . Knowledge of results is doubtless more important when the probability of error is high. When the probability of error is kept low, as in a typical linear program, it becomes less important to have immediate knowledge of results." *See also* B.F. SKINNER, *supra* note 9, at 153, where he states, "[O]ne of the most striking principles to emerge from recent research is that the *net* amount of reinforcement is of little significance. A very slight reinforcement may be tremendously effective in controlling behavior if it is wisely used."

[17] J. HOLLAND & B.F. SKINNER, THE ANALYSIS OF BEHAVIOR (1961).

Hundreds of Skinnerian-type programs, from beginning reading or writing to advanced algebra, have now been written and tested. They are in use from first grade through university-level courses, and in industry.[18]

Some programs are presented through specially designed books. Others are computerized, and are presented through a console that may include a television screen, a sound system, and a typewriter keyboard.

The typical Skinnerian program is highly structured. It does not have branches contingent upon the student's performance. Acceptable response patterns are rather narrow. Perhaps because of this, law teachers have tended to assume that programmed instruction, if applicable at all in legal education, holds most promise for highly structured areas, such as legal problems covered literally by detailed codes, or the purely terminological relationships of a well developed field.[19]

Of course, if programmed instruction could be shown more effective than conventional instruction in the above two categories, it should be welcomed as a useful addition to our repertoire of methods. However, there is no reason to assume that its potential is narrowly confined. Stimuli can gradually be made more complex until students are responding to highly abstract relationships among various portions of a total situation. So too, the range of acceptable responses can be made greater as the program moves from areas in which only one response is correct to areas where a range of appropriate responses can be suggested. At such levels, a program might merely ask a student to study his response in order to determine whether or not he had considered certain issues. Some responses could be submitted to an instructor, if detailed and expert evaluation were needed for appropriate reinforcement.[20]

---

[18] A most useful compilation is C. Hendershot, Programmed Learning. A Bibliography of Programs and Presentation Devices (1964 and supplements). The most complete collection of articles on programmed instruction is A. Lumsdaine & R. Glaser, *supra* note 7. Other useful books include W. Deterline, An Introduction to Programed Instruction (1962); E. Fry, Teaching Machines and Programmed Instruction (1963); E. Galanter, Automatic Teaching: The State of the Art (1959), F. Green, The Learning Process and Programmed Instruction (1963); R. Mager, Preparing Objective for Programmed Instruction (1962); O. Milton & L. West, P.I.: Programmed Instruction, What It Is and How It Works (1961); W. Smith & J. Moore, Programmed Learning: Theory and Research (1962).

[19] That this assumption is not necessarily true is demonstrated in C. Kelso, A Programmed Introduction into the Study of Law, Part I: Case Skills (1965). This was written primarily to teach an area considerably removed from that of the highly structured code: the skill of reading legal materials, particularly related judicial opinions, for and with understanding. It was hoped thereby to suggest the versatility of programmed instruction. Undoubtedly, programmed instruction could be used to teach other basic skills now taught only by costly individualized effort (if they are deliberately taught at all) such as effective composing, editing, listening, researching, and studying.

Successful application of the now conventional format of programmed instruction to many different subject areas and to lawyer skills would certainly be an important first step in applying behavioral psychology to legal education. However, a far more important point is to realize that the principles underlying Skinner's technology of education are not limited in their application to conventional programmed instruction. Application of these principles can improve conventional classroom instruction, as well as conventional course materials. They lead on to highly sophisticated multi-media catalysts for learning, and suggest the value of inter-institutional linkages for learning and research. They suggest jurisprudential perspectives for analyzing and improving the law. They are relevant to a miscellany of problems including law school administration, the design of law school buildings, and planning the law curriculum.

The following sections of this article will explore some of the ways in which behavioral psychology can in these areas be a springboard for imaginative legal educators.

II. EDUCATIONAL TECHNOLOGY IN LEGAL EDUCATION

A. *Applications in Conventional Courses*

As an introductory aside, it should be noted that "technology" has two meanings: (1) sets of equipment or machinery which facilitate an operation and (2) systematic application in a practical setting of basic principles validated by scientific methodology. The word is used primarily in its second sense in this section.

It is not the purpose of this article to suggest that classrooms be filled with audio-visual aids, or that computers be substituted for teachers. Of course, to the extent that systematic application of basic principles calls for interaction between men and machines, this article will not hesitate to suggest exploration. However, for the moment, put aside the spectre of computers. Assume only a teacher and his students, with perhaps the usual surroundings of books, pens, chalkboard, and chalk. Let us have a behavorial look at the case method, the problem method, the lecture, and, then, clinical courses and other recent developments.

---

[20] Substantive areas have already been programmed! Professor Wills, at Miami, teaches Criminal Law by use of programmed instruction. *See* Diertke & Wills, *Investigation of the Use of Programmed Instruction in Legal Education*, 15 J. LEGAL ED. 144 (1963). The author has taught portions of Conflict of Laws and Trusts by programmed instruction. *See* Kelso, *Programmed Instruction Shows Promise for Training Lawyers: A Report on an Experiment*, 14 J. [illegible] ([illegible]).

It should come as no surprise to many authors of casebooks or to classroom experts that they have been behaving for a long time as if they had consciously been applying behavioral psychology in planning and presenting their class materials.[21] For example, with respect to the sequencing of stimuli, many teachers plan questions for class. They avoid "spoonfeeding" the answers, which would be indiscriminate use of potential reinforcement. Instead, a classroom master develops subsidiary questions which hint or suggest directions of thought that aid a student more precisely to state a point, or more effectively to reach for an idea almost grasped.

Some teachers, though they do not plan an ordered sequence of questions, come to class with a written or mental list of the most important issues or problems illustrated by the materials. The issues or problems are discussed when the teacher senses that the students are ready to deal effectively with them. Hence, the teacher provides opportunities to reinforce his students for lawyerlike behavior.

In a real sense, a class so run is a branching oral program — provided that students promptly are reinforced for acceptable responses and that the nature and sequence of questions and other dialogue has a cumulative or "spiral" effect, *i.e.*, later work builds on earlier responses and is not merely a repetition of earlier behavior with new terminology.[22]

A typical pattern in a case method class is this: the teacher begins by asking a student to make a careful statement of who is suing whom, and for what relief. After procedural matters are cleared away, students are called upon to explore the theories on which recovery was or was not, could or could not have been, granted. When the underlying basis for the decision is reached, the questions usually become more sophisticated. The students must react not only to literal words, but must also be sensitive to the method by which the judge handled prior case materials or other legally pertinent variables. A student will be reinforced by the teacher only if he accurately states such matters as relationships between cases, how the judge resolved the pros and cons involved in deciding a case, or how slightly different fact situations might be treated by the court. An ability to restate in one's "own words" is often used to test whether a student has really understood the matters about which he speaks, or whether he has merely hit upon a phrase in an opinion, footnote, or canned brief.

---

[21] "How does a program teach? It teaches by age-old methods of telling the student what he should know or carefully leading him through the steps of discovery." However, it also "teaches by asking the student to put his new knowledge to work immediately, to finish the sentence, do a problem, answer a question — not at the end of the chapter or the end of the unit or the end of the semester, but at the moment of acquisition. A textbook cannot do this, and a teacher can do this for only one of the students at a time, the student who is called on. It teaches by compelling each student to take each step on his own. He cannot depend on his brighter classmates, nor raise his hand when he happens to know the answer." Markle, *Inside the Teaching Machine*, in American Education Today 231-32 (P. Woodring & J. Scanlon eds. 1963).

[22] During 1961 and 1965 the author visited 120 law schools as study director for the Association of American Law Schools' Study of Part-Time Legal Education and, as a part of that study, attended classes. During this time nearly 1000 law teachers were observed at work. With respect to the sequencing of problematic stimuli, it has seemed that when a teacher was most closely in rapport with his class, the discussion, like a good play or novel, approached a peak of dramatic or intellectual complexity, changed direction, then spiraled toward another central question.

If students are well prepared, the above pattern provides many opportunities for active response, vocal or sub-vocal, and for reinforcement. However, particularly as the teacher reaches more sophisticated regions, many different sub-vocal responses may be generated, only a few of which can be vocalized and explicitly reinforced.

A slightly different classroom pattern develops when the problem method is used. The reason is that problems, when properly constructed, give the professor more control over the nature and sequencing of student behavior than do a series of cases to be read. Only a certain number of paths lead in the direction of solving a problem, whereas cases can be read in a multitude of ways. Classroom discussion of a problem assigned in advance tends to center on pros and cons relating to specific issues or strategies. Building these pros and cons calls for active responses, and may produce a greater volume of active, vocal responses than merely reading cases — even if the students have acquired habits of attempting to synthesize law from groups of cases read. Furthermore, the range of responses generated by problems may be narrower than that produced by case reading. Hence, if students prepare with any degree of diligence on problem method assignments, very likely there will be many more opportunities for reinforcing the kind of behavior that the professor hopes will be strengthened by taking his course. In building his problems, the professor can implement with some precision a prior determination of the kind of knowledge and skill he intends to develop.[23]

With respect to the reinforcement phase of educational technology, regardless of whether the case method or the problem method was being used, it has been observed that teachers who keep students most actively engaged in a dialogue usually make clear in some manner the degree to which each student's contribution approximates an ideal response that commands respect.[24] The ideal usually is not a specific statement or result the teacher hopes to hear (although many teachers do "restate" answers for purposes of recordation in student notebooks), but rather an answer which embodies a satisfactory reasoning process.

---

[23] An excellent report on the status of the problem method today, prepared by Prof. David F. Cavers, is THE PROBLEM METHOD, 1966: SURVEY AND APPRAISAL, 1966 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, PART I, at 198 (report of the Teaching Methods Committee).

[24] *See* note 22 *supra*.

In addition to presenting sequenced stimuli of spiraling complexity, and reinforcing responses with sophisticated discriminations, a third classroom characteristic that accords with principles of effective learning frequently can be observed: American law teachers today are usually quite sparing in denunciation, deliberate embarrassment, or other forms of deliberate punishment. They prefer instead either to move on to another student, or to work with a series of "prompting" questions until the erring student regains the path.[25]

Although the preceding analysis has been limited to class dialogue, some teachers bring life to a subject by lecture. Such teachers induce their audiences to respond, subvocally, to the kind of variables which move the teacher, such as retracing the steps of highly original thinking; or moving frequently from one level of thought to another — evidence to conclusions, conclusions to support, experience to reflection, what is to what should be; or comparing, evaluating, or in some other way bringing considered philosophic premises to bear on some problem. Ineffective lectures, which fail to hold the listener's attention, tend to remain at one level of abstraction, such as recounting rules of law which apply to certain logically determinable variations on a basic situation. Such a lecture does not challenge the mind with new patterns, create the tension of anticipating the solution of a problem, or build connections between the world of words and the world of perception or of ideals.

The above analysis serves as a useful reminder that law teachers and law students deal almost exclusively with verbal behavior —

---

[25] Lack of intentional classroom punishment may not be sufficient to avoid the emotional effects on beginning law students of a lack of immediate feedback on overall performance or the apparently never-ending question-upon-question (which creates a very intermittent schedule of reinforcement). Professor Watson has suggested that this may interfere with the development of professional predispositions, or may even erode them, and he has called for greater teacher sensitivity to student emotions.

> If a student senses cynicism or criticalness in the teacher regarding the emotions he expresses, he will swiftly learn to obscure them from visibility as well as awareness. This reinforces the very defenses we wish to obviate. It is just at the point when students freely express themselves that they hang in precarious balance. If feelings and emotions are treated as acceptable whatever they are, then and only then may they be kept in awareness long enough to test their rationality and validity. A person's current attitudes were generated from what was once a real situation. It is only when they are reapplied to a new and different set of facts that they become unreal and irrational. This is the reason why one of the goals in professional education should be to help students re-examine their feelings and attitudes in light of the impending role of lawyer. So far as education for professionalism is concerned, this is the moment of truth.

Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1, 17 (1963). He has delved even more deeply into the problem in *The Quest for Professional Competence: Psychological Aspects of a Legal Education*, 37 CIN. L. REV. 93 (1968). The University of Miami Learning and Instructional Resources Center has a video tape and a 16 mm. kinescope of Professor Watson illustrating some of the problems aand demonstrating some solutions.

whether the format be reading, listening, lecturing, or discussing. The problem of teaching verbal behavior relating to law is somewhat different than that of teaching verbal behavior relating to science. There, uttering a word such as "tree" or "miscroscope" can be reinforced in the presence of a particular kind of object. In law, words such as "negligence" or "domicil" have no unique perceptual counterparts. They gain meaning only gradually. The words must be heard, read, used, and reinforced in the presence of many other words and many different fact situations.[26] This must be so, since to the extent that any written or printed word is understood by the listener or reader, he must be responding, subvocally at least, to variables similar to those which influenced the speaker or writer. To read an opinion with understanding is to behave in some way as did the judge. To understand a professorial comment is to behave analogously to the professor. Hence, a lecture or discussion which deals with examples is easier to follow and ordinarily will teach more than one which is entirely intraverbal and patterned largely on the oral presentation of an encyclopedia. So, too, a lecture or discussion is more effective if it moves from one level to another (*e.g.*, by induction or deduction from facts to principles or principles to results — patterns of thought for which most law students have been reinforced during their previous formal or informal education).

Langdell's invention of the case book was successful primarily because many more active responses were strengthened when students read opinions than when they merely read summaries or heard about cases. Selective reinforcement of active responses in the classroom and in discussions with fellow students made students more lawyerlike. It is highly probable that study of transcriptions, recordings, or video-tapes of law teachers in action would confirm the above observations as well as provide valuable aids for training future law teachers. Some work in this direction is already underway.[27]

---

[26] A thorough treatment of these matters appears in B.F. SKINNER, VERBAL BEHAVIOR (1957). The crucial distinctions in verbal behavior are not between nouns, verbs, conjunctions, and the like. The critical distinctions depend upon the reinforcing contingencies which strengthened the behavior. For example, a deprivation may have been reduced ("please pass the bread"). Or, a person may have been reinforced for making connections between words ("red, white and *blue*"); between words and some environmental properties ("the *flower* is *red*"); or between words emitted and the variables which strengthened their use ("all *A* is *B*, no *B* is *C*, therefore no *A* is *C*"; or I *see* a storm coming" in place of "I *read* that a storm is coming").

The same analysis can be applied to "seeing" things in one's imagination and to thinking. Thinking can be analyzed as simply a sub-vocal form of thinking out loud. If a person has a problem, in the sense that some behavior has been strengthened by a deprivation or a potential reinforcer, but that behavior cannot be emitted, the person may manipulate variables by using his hands, his speaking voice, whispers, or subvocal behavior. If he is able to emit the blocked behavior and is reinforced, *e.g.*, he is able to pick up car keys that had become buried under a pile of papers, then he has solved a problem and his problem solving behavior is strengthened.

"Seeing" things in one's imagination is a matter of behavior having been reinforced. In many situations persons are reinforced for retention of visual or auditory sensations. At first this behavior cannot be maintained in strength for very long. However, when a substantial history of reinforcement has occurred, quite vivid and detailed images can be called to mind.

Even general techniques for problem solving can be selectively reinforced in different contexts. Thus, it is logical to assume that persons someday will efficiently be taught not only how to learn but also to engage in that behavior quite extensively. And, again following Skinnerian observations, persons can be taught to teach.

Though communication between law teachers based upon common observations of law classes is still in its infancy, law teachers have increasingly been willing to explain what they hoped would be taught by using certain course materials, and how it might best be taught. Thus, coursebook authors are now preparing manuals that explain "how-to-teach-it" and "why." At first such publications were only for teachers. Lately, students are also being let in on the secrets. At first this was by way of an extended introduction covering what the book was about. Today, however, coursebooks are tending to include more text. The author states his views and opinions, thus placing before each student much of the synthesis that Langdell would have wanted the student himself to construct. Furthermore, the author may place in footnotes some of his favorite class questions, thus suggesting directions for preparation to the law teacher in the casebook itself. And today's footnote questions often go beyond the "suppose X fact changed to Y, what result," with a citation to a decided case. More complex problems are appearing, which clearly call for students to apply a synthesis, whether their own or one supplied by the teacher, a hornbook, or otherwise.

Thus, consciously or not, to generate more responses and to sequence stimuli so that discriminative reinforcement can be used more effectively, today's teachers are blurring the distinction between case method and problem method. However, teachers who wish to generate a larger number of student responses for selective reinforcing usually have turned in another direction: the clinical course, such as appellate moot court, trial practice, interviewing, or legal aid clinic.

B. *Applications in Clinical Courses*

Many active responses can be predicted when the contingencies of reinforcement are such that a specific problem is presented, and reinforcement for its solution can only be obtained by action. This is what occurs when students are placed in a clinical situation.

---

[27] Professor John Murray has prepared tape recordings of teachers in action, and an observational evaluative questionnaire. He has proposed the creation of a clearing house to facilitate anonymous critiques of tape recorded classes for professors who desire the benefit of such evaluation. See 1966 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, PART I, at 261-61 (report of the Subcomm. on Evaluating Case-Method Instruction). The University of Miami has produced, under the auspices of the 1967 Teaching Methods Committee, a series of nine video tapes (which have been kinescoped) featuring eight great teachers in action. The starring teachers are Fleming James (Yale), Harry W. Jones (Columbia), Robert Keeton (Harvard), Allen McCoid (Minnesota), Soia Metschikoff (Chicago), Harry Reese (Northwestern), Myres McDougal (Yale), and Andrew S. Watson (Michigan).

The main teaching problem in clinical courses is to create opportunities for observing responses and for promptly reinforcing them. It is difficult to say, "Good question, Jim," while a student is still interviewing a legal aid client. However, some very imaginative experiments are going on. One of the most successful appears to be that of Professor Robert Keeton, at Harvard Law School, who has been engaged in it so long that perhaps "experiment" is no longer the proper term. A description of a part of his course in Trial Tactics should suffice to make the point.[28]

Professor Keeton provides students with a set of materials including witness statements, and asks two-man teams to represent the parties at a hearing. The problematic materials are so structured that there are valid conflicting arguments about whether a particular witness should be used at all; about the issues with respect to which his observations are relevant; and usually about whether, though he can provide favorable testimony with respect to one issue, unfavorable matters could be brought out on cross-examination.

The student teams interrogate the witness, with the instructor making rulings as would a judge. Then the entire class joins in a critique on the performance just observed. If other members of the class believe that pertinent facts could better have been produced by other questions, they are invited to try out those questions on the witness. The answers then received are placed before the house for critique.

Professor Keeton permits the discussion to range widely, but does insure that certain critical questions are asked: What did you hope to get from this witness with respect to what legal issue? Are you satisfied with what you did? How might you have done a better job? What were the most important problems involved in deciding whether to use the witness and what to ask him?

Keeton's approach to Trial Tactics generates a great deal of very pertinent student behavior, subject to immediate selective reinforcement. Little time is spent on subsidiary matters. The focus is on the crucial questions of how facts are proved, and the judgmental problems of deciding what to do when both reinforcing and aversive consequences can be foreseen in the attempt to prove (or disprove) a fact.

Sometimes clinical and non-clinical courses are distinguished in terms of skill versus knowledge, or practical versus theoretical.

---

[28] The following d[illegible] is based in part on conversations with Professor Keeton and on use of his T[illegible] materials, but in greater part on the video-tape of his class at the Uni[illegible] under the program described in note 27, *supra*

However, usually this is done very superficially on grounds such as easily observed responses (skill) versus covert verbal behavior (knowledge), or the frequency with which practicing lawyers are observed to engage in the behavior (practical) versus frequency of the response in the repertoire of scholars (theoretical). Such distinctions interfere with the development of an effective educational technology, and the following analysis is proposed as a more workable alternative.

Education is the process of changing behavior by arranging contingencies of reinforcement for that purpose. Knowledge, whether acquired by education or by responses to the natural environment, is potential behavior. Skill is highly refined knowledge.

Knowledge is transformed into skill when contingencies of reinforcement are such that a man becomes responsive to ever more subtle or complex properties of stimuli or to more of them; when his responses become discriminative, complex, precise, or original; and when he is able to emit more efficient discriminative and manipulative responses between finding a problem and solving it.

Practical skills, when exercised successfully, have an immediate effect on the environment or on others, and are reinforced by feedback from that effect. Theoretical skills, when exercised successfully, create understanding. They are potential verbal behavior which place a man more closely into contact with subtle or complex aspects of his environment, or provide methods by which that may be done. A man need not bring about a change in the environment or in others in order to be reinforced for exercise of theoretic skill.

Improvement of practical skills to a high level of sophistication depends upon developed theoretical skills. Since law is a form of applied social science, its theoretical skills ultimately become practical, and exercise of its practical skills is likely to be more effective if the actor also has theoretical skills.

It is useful to distinguish extremes along several dimensions with respect to both practical and theoretical skills. At one extreme are skills developed by reinforcements contingent upon prompt response to a total situation in order to facilitate pre-set goals. A stereotype is the cross-examiner at work (though, of course, he must have a guiding theory of his case). At the other extreme, reinforcement may be contingent on reflective reaction to situation-types, where an attempt has been made to determine sense for the situation and the means for bringing that sense into being. A stereotype is the brooding jurisprude.

Either a clinical or a classroom setting (lecture, case, or problem method) may be designed to call for prompt or reflective responses, abstractions or concreteness, implementation or goal-defining behavior, or various other combinations and degrees of these kinds of responses. Certainly in the Keeton course[29] students reflect during preparation, must develop theories of their case, and decide what their goal will be with respect to the witness. When the witness is on the stand, preparatory behavior must combine with prompt, implementing, and total-situation responses. Indeed, developments may well call for some on-the-spot revision of the basic plan. In the critique portion of the class session, the contingencies of reinforcement resemble those of the case class, insofar as quick thinking is rewarded, and the problem method class, insofar as perspective on the assigned materials has been sharply limited by the specific problems facing the advocates.

Recalling the principles of educational technology,[30] the above analysis suggests that in deciding whether a course should be given clinical or non-clinical configuration, a case or problem method treatment, or some other setting, and in planning activities and materials within any of these formats, the following questions should be asked and answered:

> (1) Precisely what is the behavior to be strengthened; must responses be prompt to be effective; can they be reflective; are they to a total situation, or to highly abstract properties of it; and to what extent are goals to be formulated?
>
> (2) What is the most promising sequence of pertinent stimuli, considering the structure of the field, what the students already know, and the complexity of problems to be considered?
>
> (3) What mode of presentation will generate active responses capable of observation and discriminative reinforcement?
>
> (4) Do the problems provide an appropriate challenge — one within the ability of the students, but not so easy that reinforcement for their solution has but little effect on behavior?

Of course, there are limits to the power of purely methodological engineering. It is increasingly suspected that law students will not find it reinforcing to learn behavior which does not relate to pressing community problems of our times, and which is not in some way based upon the best available data and scientific theories with respect to that data.

Keeping the curriculum relevant as well as logical is a continuing problem. Also, so long as we rely for reinforcement on a live teacher saying "right," or simply moving on to the next question or topic as a sign that all is well, there are limits to the degree of individualized contingencies of reinforcement we can construct (since we are not likely to reach a one to one faculty-student ratio for all courses). Programmed books, previously discussed, individualize with respect to speed of progression and are so designed that individual reinforcement is frequent because most responses are correct. However, for many sophisticated kinds of skills, and for skills involving interaction to printed and oral forms of communication, instrumentation is needed, both within law schools and between law schools in order to take maximum advantage of the unique strengths of each. These matters are explored in the next sections.

---

[29] See text at note 28 infra.

[30] See note 15 supra.

C. *Educational Configurations That Include Equipment*

Some law professors have used audio-visual materials. A few have produced them. However, almost all of the available materials merely present words and pictures. They do not create a new kind of educational configuration, one calling for active responses to sequenced stimuli, followed by reinforcement for the correct responses that sequencing tends to insure.

Much attention is being paid today in educational circles to computer assisted instruction that integrates written and oral stimuli and responses.[31] The potential of such sophisticated and expensive devices will be touched upon later. However, much can be done with simpler and less expensive equipment. A multitude of potentially fruitful experiments cry out to be performed.

For example, lawyers and law students must depend upon skilled listening. Much of the data manipulated in their professional problem solving comes from lectures, questions, answers, et cetera.

Listening is not a passive, inherited faculty nor a capacity to actualize pure forms. It is a set of active responses for which law students have had a long history of reinforcement, but not a history that necessarily has developed all of the sub-skills needed to listen effectively in a professional situation. The listening lawyer or law student must sort relevant from irrelevant information, connect facts with legal theories, make interconnections between legal concepts, test "is" statements against values.

It is quite likely that many law students and lawyers underperform because they do not know how to listen effectively (just as many perform at less than full capability because of specific difficulties in reading, manipulating concepts for problem solving, composing, editing, and speaking). There is no doubt that a test could be devised to determine how well a student listens, and that a program could be placed on tape to develop the ability to listen effectively.

---

[31] *See* PROGRAMMED LEARNING AND COMPUTER-BASED INSTRUCTION (J. Coulson ed. 1962) and Swets & Feurzerg, *Computer-Aided Instruction*, 150 SCIENCE 572 (1965).

While it is not the purpose here to sketch out an entire course along this vein, one of the most important skills which should be developed is to listen for the main theme of an oral presentation and, having separated it from the rest, classify other portions of the statement as supporting evidence, elaboration, and proof. Just as a legal reading course can improve understanding of written materials, so a tape recorded program, probably combining tape with a syllabus, work materials, and tests, could improve listening with understanding to legal presentations. It is assumed that such a program would not merely be aimed at understanding lectures, though it might start there, but would also include understanding a discussion and understanding an interview.

A listening program might well be taught using several different fields of law or several different kinds of legal problems. However, it might perhaps be better taught in the context of a particular first year course. There is no reason, for example, why some branch of torts could not be taught via a listening program, in order not only that the students would learn that part of the course, but also that they would respond more effectively to oral teaching in all other parts of the subject and their other courses. The program might also teach something about note-taking.

A history of positive reinforcement generated by such a program might make possible a form of learning not now in use — supplemental tape recordings available in the law library for fine points that cannot ordinarily be reached in class. Further, the library might find it advisable to stock up on tapes relating to recent developments in the law. Such tapes are now being made available commercially to practicing lawyers.

In addition to teaching listening skills, the tape recorder could well be used to teach discussion skills, as an incident to or part of learning law. Programmed problematic situations, probably related to a course then being taken, could be presented in writing (or orally from a tape) to a small group of students. They would be expected to discuss the problem until they felt the need for an operation to be performed of a kind that a discussion leader or a teacher would perform in class. Class operations include giving gentle hints, giving strong hints, suggesting a list of issues that should be considered, providing additional information on some phase of the problem, indicating whether some specific sub-answer is right or [illegible] or giving an opinion on the main problem. With respect to [illegible] the programmed problems, these discussion-leader functions could be placed on the tape, and the recorder so structured that students could easily reach the spot on the tape which provided the desired operation with respect to each problem.

A discussion program, such as outlined above, might have the incidental effect of reviving or extending interest in the old-fashioned bull session about legal problems. Moreover, student assistance in constructing discussion tapes would provide a creative outlet for student energies that might ultimately prove almost as beneficial as writing the standard law note or comment.

Tape recorded programmed instruction, described above, has some branching built into it, since the students need not ask for each of the possible aids to discussion for each problem. However, if we are fully to individualize programmed instruction, it becomes necessary to employ complex equipment such as computers. Again, it is important to note just what the computer is adding, so that unlike the movies previously created for legal education, we are not merely spending money to present something to students in a fancier package that could just as well be done via a book.

For example, an adequate program on legal writing probably could be prepared in book form. Writing may be divided into composing and editing behavior. An experienced writer edits as he composes, trying out in his mind several versions of a sentence, and then writing the best one — keeping in mind the overall organization and theme he is trying to present. The less experienced writer has to get something out on paper and then go over it. Indeed, even the best of writers, particularly when working in a new area, occasionally needs to use a blue pencil on his first efforts.

A program to improve a law student's ability to write should begin, like the teaching of chess, with the ending game — editing. Indeed, a program has already been written on editing non-legal writing.[32] It is a fascinating experience to take the program. Such a program could rather easily be written for law students. It would include matters of editing for citation form, common misspellings found in legal writing, grammar, and diction. Also, it would call upon students to detect errors in logic, and the misuse of autoclitics (words or phrases which describe relationships between other words, or between words and external experiences of the author).

The program should probably begin with sentence problems, move to paragraphs, and then to relationships between sentences and paragraphs, particularly the use of topical sentences. This would provide a lead into composition, which might well start with a form of writing which embodies a great deal of editing behavior — the composition of headings. Headings are heavily edited writing since what has been composed must be checked, rechecked, and, typically, many times revised in order to make sure that the essence of the following text has been captured. Students could be given the substance of legal arguments from well written briefs, and then challenged to draft headings which fit the substance. Then they could compare their work with a check list of questions, re-edit their work, and, finally, compare it with examples provided by the author. Going a step beyond, students could then be given the raw materials from which an argument, case note, or memo could be composed.

---

[32] R. SHURTER & J. REID, A PROGRAM FOR EFFECTIVE WRITING (1966).

Further, the law schools certainly need a program which teaches law students something about how to write a law examination.[33] Such a program could provide information and casebook references, and then begin by asking very simple questions. Sample answers would be provided. The questions would then become more complex. The order of questions need not and probably should not correspond with the order of things in the casebook. However, it might well be confined, in its early stages, to the earlier portions of a particular course, so that freshmen could work with it during the semester before final review time rolled around.

The important thing is not that all such programs be taken by all law students. The critical point is that specialized supplementary materials should be available in the law school for students who have special needs.

Although a program on writing could be presented in book form, to embody it in a computer would have several advantages. First, student responses could easily be recorded for future study. Second, the program could be amended easily. Third, as patterns of student response were learned, branches of the program could be constructed to deal with special kinds of responses and problems observed at each step of the way. Fourth, and most important, the composition and editing of legal writing could lead to the next step: challenging a student to prepare a legal writing that solves a problem for which not all of the relevant material was provided in advance. The other relevant material could be stored in the computer and made available if the student took the proper search steps.

How to do research by using a computer could be taught by a program built into the computer. This makes a great deal of sense, looking to the future, because legal research materials are increasingly becoming available in computer systems.[34] By teaching editing, composing, and research on a computer console, and then adding research technique, we would be using the machine as a combined teaching and research instrument. Probably the machine would have the capacity to permit editing of a draft by some kind of interlineation, and then it would print out, at high speed, a revised copy of what had been prepared. Thus, it is highly probable that the total time involved in researching for and preparing a written argument could be substantially decreased, and in all likelihood the thoroughness of the research would be enhanced.

---

[33] Just about all that most students ever see on the subject is found in the booklet by Professor S. Kinyon, How to Study Law and Write Law Examinations (2d ed 1951). It is one thing to be told how to write exams and to read examples. It is quite another to [illegible] answers, from simple to subtle, being reinforced along the way, and to [illegible] from simple to complex, having had opportunities all along the way [illegible] work.

Of course, substantive courses can be programmed for computer-assisted instruction. Demonstrations of programmed instruction in criminal law were included in the 1965 and 1966 audio-visual exhibits at the annual meeting of the Association of American Law Schools. Questions and information were presented on a console. Answers could be typed on a keyboard. The computer then evaluated the answer and presented the next problematic sequence.

Thus far this article has suggested that not only substantive courses, but also skills such as listening, problem-solving, and communication could be taught more effectively by conscious application of educational technology. It has been indicated that this could also occur by more conscious application of Skinnerian principles in the classroom and in the preparation of conventional materials. However, there is yet another dimension to consider in the teaching environment — learning by responding to print or voice combined with pictures presented by television and/or movies.[35]

It is clear that lawyers and law students constantly must respond in situations where what is heard or read must be placed in context. Although it is uncertain how much time should be allotted for experiences such as those described below, it seems that they would provide kinds of valuable learning experiences not now available, and that experimentation in these areas would be worthwhile.

First, lawyers are sometimes called upon to reduce to writing a general agreement reached between negotiating businessmen. A film might be produced showing two businessmen in negotiation. Students representing each side could be asked to negotiate the details and reduce them to a written contract for signature. The raw data could, of course, be presented via a summary, a transcript, or a tape recording. However, the total scene, as depicted by a movie or video-tape, would be a far better stimulus, and certainly a more realistic one. Listening, note-taking, and situation-reaction skills would be put to a rigorous test.

---

[34] C. RHYNE, THE COMPUTER AS AN AID IN LEGAL RESEARCH (National Institute of Municipal Law Officers Report No 150, 1950) (containing an extensive bibliography).

[35] "One of the significant findings seems to be that it is possible to teach efficiently with programmed materials on television films." W. SCHRAMM, *supra* note 13, at 12.

Second, students could be exposed to several versions of an interview with a client, and asked to compare them. This could be done via scripting, with the student asked to improve the script. Or it could be done live, by instructors or students. However, a more economic use could be made of teacher time by having the stimulus recorded and, as distinguished from a transcript, the film or videotape would provide the opportunity to respond not only to what was being said in the interview, but to the total picture as well.

Third, a backstage look could usefully be taken of great judges deciding a case which had been argued before them. This might provide new insights into a phase of the judicial process not heretofore brought to light.

Fourth, students could be asked to prepare on a series of cases, as for a regular class, and then attend a video or movie presentation of a class taught by a great teacher covering those materials. The presentation could direct questions to the student audience from time to time. The audience might be provided with some kind of sheet on which answers could quickly be recorded. Perhaps some answers would then be revealed on the work materials. Perhaps the answers would thereafter develop on the screen. The best configurations would have to be determined by empirical experiment. Once the proper formula was found, the expertise of great teachers could be extended far beyond the boundaries of their own schools, and in ways more educationally compelling than in their casebooks, treatises, or articles.

The law schools simply must begin experimenting with the use of television as a catalytic agent for discussion. In the past, and perhaps up to the present time, law students were for the most part print-oriented. Increasingly, however, the law schools will have a generation of students who have worked with programmed instruction and who will have learned from educational television, as well as having spent countless hours in front of television sets.

Law schools have to take their students as they come and cannot totally remold their methods of learning. And, according to Professor McLuhan, television is a medium which induces a high degree of total involvement, much as if the viewer were experiencing an extension of his tactile sense and not merely his eyes and ears.[86]

---

[86] M. McLuhan, Understanding Media: The Extensions of Man (1961), and M. McLuhan & Q. Fiore, The Medium is the Massage (1967).

Students who have grown up on such fare will expect higher education much more to resemble a "happening" than a lecture.

Surely, in years to come, television will be permitted in high courts so that law students and others can experience arguments live, and thus can participate in decision day. If immediately thereafter, what they experienced could be discussed with a professorial expert, the impact of such a jurisprudential "happening" would probably be much greater than reading the case after it had been neatly packaged in a casebook. Through such a medium a sense of immediacy and urgency, as is found partly in *U. S. Law Week*, could be added to legal education. It is difficult to think of a better way than this to intensify law students' involvement in important community problems of our time — an involvement which is almost as real as the clinic, and perhaps much more beneficial because of the possibility of having a professorial expert selectively reinforce reactions to what was going on. Because television can take students into the street and into business, it should be used, or tried, as a device to promote more systematic study of the major community problems of our time.

Of course, trials, appellate arguments, and opinion day should be tape recorded as well as viewed on a monitor. Selected portions could be edited and preserved. But even for discussion purposes, there is a great value, after just having experienced the whole, in going over it, stopping the tape from time to time, and discussing a particular point or series of events.

Television and computers are expensive equipment. However, if a television program is being presented, it is cheaper to present it over a network than repeat it many times locally. The same is true of computer assisted instruction: it may be more economical to have many terminals at various schools connected to a time-sharing instrument, than to have many computers at each school. Indeed, one of the great potential benefits of instrumentation is that it can be used not only to increase the teaching effectiveness of a faculty within a single school, but also to create productive interchanges between schools.

Telelecture or radio can transmit voice communication between classes at widely separated points; telewriting and slow scan television can add a visual dimension to the experience. Consoles for computer assisted instruction can be connected by long distance telephone wire to the computer. Soon to come on the campuses of many universities are inter-university communications centers which will facilitate and coordinate activities such as those mentioned above. Cooperation between law professors at different schools can be expected to evolve into creation of courses capable of being taught and taken at several universities simultaneously, or being used as supplementary work by students at several law schools.[37]

III. BEHAVIORAL PSYCHOLOGY, LAW, AND THE CURRICULUM

A. *The Rise of Reinforcement and the Decline of Punishment*

Law is intended to influence behavior. Thus, it embodies assumptions on how behavior is controlled, as well as judgments on what kinds of behavior should be encouraged, discouraged, or left in freedom. Law is effective because of (or perhaps should even be defined as) the contingencies of reinforcement maintained by government officials.[38]

Historically, our legal system has assumed that men seek to gain rewards and avoid punishment, and that fear of punishment is the most practicable contingency of reinforcement for the government to maintain. However, the limitations of punishment and the power of reinforcement were being discovered by lawmakers even before Professor Skinner conducted his experiments. In fact, it can be argued strongly that the civilizing of law has been marked by a shift from punishing undesirable behavior to reinforcing desired behavior.[39]

For example, creation of the Federal Trade Commission[40] was a step away from the jurisprudence of punishment. Punitive court litigation was not deemed an adequate procedure for gray areas in antitrust problems, where decisions must be based on economic or social effects rather than evil or predatory motives. The Commission was to determine cause-effect patterns. Its programs of voluntary compliance reflect its raison d'etre much more than does a cease and desist order.[41]

Reinforcement principles are more clearly evidenced by programs such as social security and medicare. Though there is a very slightly felt punishment in payroll deductions, an enormous amount of fairly predictable personal planning is based upon reinforcements anticipated or being provided for by these programs. Again, the behavior of businessmen is significantly influenced, more predictably than if criminal laws were used, by tax deductions, exemptions, or allowances.

---

[37] Systems for accomplishing these linkages are described in a pamphlet that emerged from the Audio-Visual Exhibit at the 1966 annual meeting of the Association of American Law Schools. The help of Mr. Michael H. Beilis, of American Telephone and Telegraph, in preparing the exhibit is gratefully acknowledged. *See* AMERICAN TELEPHONE AND TELEGRAPH COMPANY, COMMUNICATIONS TECHNIQUES FOR LEGAL EDUCATION AND RESEARCH (1967) (distributed by A.T. & T., 195 Broadway, N.Y., N.Y.).

[38] *See* B.F. SKINNER, *supra* note 9, at 339.

[39] Skinner has noted the same trend in all of society. "Not only education but Western culture as a whole is moving away from aversive practices. We cannot prepare young people for one kind of life in institutions organized on quite different principles. The discipline of the birch rod may facilitate learning, but we must remember that it also breeds followers of dictators and revolutionists." B.F. SKINNER, TEACHING MACHINES, *reprinted in* A. LUMSDAINE & R. GLASER, *supra* note 7, at 158, and B.F. SKINNER, *supra* note 5, at 1[illegible].

[40] Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609 (1967).

[41] [illegible] *Voluntary Compliance: An Adjunct to the Mandatory Process*, 38 IND. L.J. 377 (1962).

Today, reinforcement is being proposed as a supplement or substitute for punishment even in some areas where the conduct sought to be changed is clearly undesirable. For example, anti-pollution laws are being urged which would provide tax benefits in return for money spent by polluters to install control equipment.

Such programs may make one apprehensive about the possibly undesirable side effects of "reinforcement" as distinguished from "punishment" jurisprudence. Of course, all ramifications of any law should be traced. This is particularly so when a reinforcement provision depends not upon behavior, but upon a status — as in most welfare programs. If reinforcement is contingent upon a status which can voluntarily be created or continued, then unless the program is carefully structured, it can tend to bring about or continue the status for many individuals, even though the most desirable goal is behavior that avoids the status. Thus, for example, all is not well with a welfare program which encourages fathers to remain "incognito" for fear that aid to dependent children may be cut off.[42] For similar reasons, subsidy programs must continually be monitored.

However, the problems of developing a reinforcement program so that it efficiently and effectively produces desirable behavior, and does not result in undesirable by-products, are ordinarily much less troublesome than those associated with trying to administer punishment successfully. It is no exaggeration to say that where punishment still remains in the law, there you will usually find unsatisfactory administration, failure to achieve stated goals, and even a deterioration of the process by which goals are formulated. Just a few quick examples: think of how we jail intoxicated persons as if they were criminals; think of the environmental situation into which we throw persons accused for the first time of a misdemeanor; and consider the social erosion caused by too quickly branding youths as delinquents. When punishment theory gets too far away from what the public will accept, as where the law purports to grant a divorce only as a punishment to a wrongdoer, the whole system breaks down into myths and devious procedures — devices which, unfortunately, are all too often available to the prosperous, but not to the poor. Indeed, almost across the board, the punishing aspects of our legal system apply much more to the poor than to prosperous persons. Persons of means are much more likely to be affected primarily by programs based on the more civilized and advanced jurisprudence of reinforcement.[43]

---

[42] Some recognition of this problem was contained in the Social Security bill passed by the House of Representatives on August 17, 1967. However, the tenor of the changes was punitive — stop certain past abuses — rather than to reinforce new forms of behavior. Reported in the Miami Herald, Aug. 18, 1967, at A1, "The House approved a major increase in Social Security benefits and tough new welfare restrictions to discourage illegitimate births . . . . The child welfare provisions are intended to get jobs for unwed mothers and to stop a frequent practice of fathers leaving home so the mothers can qualify for welfare payments."

Rather than attempt to catalogue further instances from the past or present, let us examine several examples of how a behavioral perspective — one which emphasizes reinforcement rather than punishment — may help suggest approaches for solving pressing community problems at the local, national, and transnational levels.

Locally, the most important function of government is to insure that the physical environment adequately supports recognized values. Property tax relief for sums spent by landlords to improve substandard housing would probably produce more tangible results than an equivalent amount of money spent on housing code enforcement. Indeed, going a step further, it might be possible to create a system whereby money spent or labor invested by tenants to improve their housing conditions could be treated as a credit against rent. The possibility of ultimately securing ownership of a condominium via an option procedure, perhaps coupled with government rent sudsidies on certain conditions, should also be considered as a tool for encouraging behavior that would result in more suitable housing conditions in our cities.

The problem of pollution could be attacked not only be requiring new automobiles to have filter equipment (or electric motors), but also by selling cheaper license plates to automobiles equipped with operational filters (or electric motors). Thus, older cars as well as new could rather quickly be swept into a system for abating exhaust fumes, without resorting to the paraphernalia of punishment — tickets, summonses, court appearances, fines, and the like.

With regard to the above matters, and indeed with respect to all or almost all phases of planning for improvement of the local environment, procedures which encourage and reward greater public involvement in the early stages of developing an overall plan would pay off many dividends in greater public support for implementation of the plan. Furthermore, the plan probably would be better if such procedures were followed.

Moving now to broader geographic areas, regional problems center primarily around developing and conserving resources, and providing for their fair distribution. Action on the regional level would be substantially accelerated if federal support were readily available to subsidize planning conferences and the research and drafting necessary to produce interstate compacts. Permanent staffs created by groups of states in a regional area to deal with these matters would broaden thinking from "What's best for my state?" to "What's the best means for dealing with the resources of this region?" Such staffs would turn inevitably from considering such questions as how to obtain the maximum gallonage of water in an interstate river for local allocation, to questions such as whether the maximum economic benefit from the water in an interstate river can be derived from irrigation or industrial use.

---

[43] U.S. NATIONAL CONFERENCE ON LAW AND POVERTY, CONFERENCE PROCEEDINGS ([illegible] 23-25, 1965).

Turning to the national scene, there is today much concern about demonstrations, which, depending upon their intensity, may shade into riots. The problem is both local (because people and property must be protected from physical violence) and national (because the variables that generate most demonstrations or riots appear to be nation wide in scope).

The stimulus-response-reinforcement paradigm makes it clear that if people are reinforced for demonstrative behavior, the behavior of demonstrating will be strengthened. If the existence, amount, and promptness of the reinforcement is proportionate to the intensity of the demonstrative behavior and/or the number of persons involved in the demonstration, then it becomes probable that even more intense demonstrations will occur in the future.

The next step in reasoning is not to opt for more repressive measures against demonstrations. Far from it. The burnings, violence, and disruption of a riot impose tremendous punishment on the very people the rioters apparently hope to benefit. Further, official punishment, particularly the imposition of punishment at an early stage in a situation containing a few troublemakers and many spectators, can turn the spectators into a mob because punishment, experienced or observed, creates emotional and unpredictable behavior.

The basic, long-run solution is to reinforce behavior incompatible with the onset or continuance of demonstrations or riots. Programs for reinforcing behavior that predictably lead to good jobs, sound education, and decent housing have of course been recognized as necessary ingredients in any total plan. Another promising step is to encourage the articulation of grievances at the earliest possible moment, particularly grievances against officialdom, and to provide prompt reinforcement for doing so. Hence it is that Professor Gellhorn's monumental studies on the ombudsman are so timely and have touched such a responsive chord.[44]

Second, there is a clear and present need to show certain dis-advantaged people that society does care, and intends to remove obstacles in their path, such as restrictive laws or practices which deny opportunities for constructive behavior. For example, whether by statute or otherwise, the avenues for entry into many of the trade unions should be broadened. Until it becomes possible to practice a trade, no reinforcer is available to encourage educational effort to improve one's skill.

---

[44] W. GELLHORN, OMBUDSMEN AND OTHERS (1966).

Third, local officials should not become so preoccupied with improved training for riot control that they fail to search for schemes that would reinforce the behavior they would like to see occur. For example, if the city fathers of Fort Lauderdale, Florida, would prefer that its annual influx of students dance rather than riot, then the city should provide plenty of music and dancing space, rather than a dark beach and an array of police alerted for riot control.

Fourth, promises should not be made in order to reinforce the behavior of ceasing to demonstrate.[45] However, promises made should be honored. Failure to carry through with a promise is a form of punishment and will produce all of the usual undesirable results.

Fifth, if a riot does break out, punishment should be held to a minimum. The "white hat" concept, used in Tampa, Florida, appears to have been quite effective. A "clear the area" curfew appears to be more effective than attempting many arrests in the midst of spectators who see in the arrests many examples of punishment.

It is recognized that the above is only a superficial start toward suggesting some means for dealing with a current national problem. The problem is too complex for solution by any such five points. However, the hope is to suggest the kind of perspective and approach that follows from applying behavioral psychology. Further examples relating to cooperation in the administration of justice, juvenile courts, and the good samaritan appear in the footnotes.[46]

Moving to the transnational arena, it seems clear that if a government is reinforced for the behavior of asking for an economic or military grant, and such grants are forthcoming for the asking, then the behavior of asking will be strengthened. What initially is viewed as a "privilege" will tend to become viewed as a "right." When such a history of reinforcement is built up, denial of further aid becomes a form of punishment and, hence, likely to be followed by emotional behavior. For an example, consider the temporal relationship of the United States' withdrawal from the Aswan Dam project and the seizure of the Suez Canal.

---

[45] Of course, efforts not to reward rioters should not lead to a punitive attitude. Whitney M. Young, Jr., executive director of the National Urban League, is rightly concerned that "Congress, 'in its obvious efforts to avoid rewarding the rioters,' will embark on 'a course of retaliation, revenge and vindictive activity' that will ultimately punish innocent Negroes as well and thereby play right into the hands of the extremists." TIME, Aug. 11, 1967, at 12.

[46] If a citizen cooperates with law enforcers as, for example, by taking a day off from work, presenting himself at the courthouse, perhaps waiting on uncomfortable benches for a time, but then learns that the trial has been postponed, the lack of reinforcement will tend to extinguish the behavior of willing cooperation. Some devices to insure against this situation should be tested. For example, postponement might be permitted only on motions timely made, with proof that witnesses have been notified or assurances that they will be notified. The situation might also improve by more efficient procedures for scheduling hearings (a few courts are using computers), and compensation for witnesses who [illegible] than once because of postponements. The contingencies of reinforcement that now face would-be rescuers are no better than those [illegible] persons who are [illegible] to cooperate in law administration. The potential [illegible] suffer no legal risk. He may help, without hope

This is not to suggest that foreign aid programs be discontinued. They have done much good. However, they should be planned within a behavioral perspective. For example, usually it is hoped or expected that the granting of aid will be followed by certain changes in the behavior of the grantee government, as in the Alliance for Progress program. Typically, it is expected that the foreign government will take some direct action. However, if ultimately the behavior which must change is that of individuals or organizations within the aided country, it may be much more efficient to encourage that behavior by having it reinforced directly by the local government through such devices as tax reductions, subsidies, and the like. Local government could then be reimbursed for its costs or loss of revenues. Also, aid programs might more often be designed as joint projects with religious and business leaders, and other leaders of public opinion, as well as with government officials. Understanding of the problems would be deeper, and responsibility for implementing the programs would be more broadly shared.[47] For example, it seems likely that some such approach will have to be used in order to obtain

---

of reward, but with the risk of being sued if his rescue efforts are not entirely satisfactory. If he is injured in the attempt, he has but slight chance of recovering his damages. Obviously, if the law wants to encourage people to help others in danger, or at least not to discourage such behavior, then the contingencies of reinforcement in the law should provide some immunity for negligence, and there should be funds to provide compensation for injuries caused by heroism. I do not favor punishment of individuals for failing to provide aid. However, some institutions could be subjected to aid-providing duties, which could be passed on by reinforcing personnel policies.

Juvenile courts are mentioned since, until recently, they were thought to be great advances in law administration. However, it is now appreciated that, informal or not, a determination of delinquency is a severe punishment. And, of course, legal counsel must now be provided for such proceedings. For the future, attention must focus on pre-hearing procedures, where constructive relationships might be generated without filed charges, detention, and the like. See remarks by Professor Monrad Paulsen in NATIONAL CONFERENCE ON LAW AND POVERTY, CONFERENCE PROCEEDINGS 77 (June 23-25, 1965).

[47] The Japanese have been using this approach in foreign aid programs, apparently with great success. For example, it has been recounted that a Japanese firm, backed by government funds, lent a Korean company considerable funds to build a chemical fertilizer plant and helped supply construction workers and supervisors. Japanese schools taught several hundred Koreans chemical engineering, and Japanese chemical companies gave them three to six months on-the-job training. The net result was increased agricultural production in Korea, whose food could be sold in Japan in return for the sale to Koreans of manufactured goods. Velie, *Japan's Quiet War Against Mao*, READER'S DIGEST, Aug. 1967, at 116.

the maximum advantage from the enormous potential supply of food and minerals that is in the oceans.

A useful analogy from this country is the procedure used in drafting the Uniform Commercial Code. Its phenomenal legislative success is undoubtedly related to the methods used in its planning and drafting. Business practices were carefully studied. Businessmen were consulted so that the Code would help commerce flow smoothly under the umbrella of fair dealing. Hundreds of lawyers participated in workshops designed to test the emerging draft from every point of view. By the time the Code was published in final draft, many people had a history of positive reinforcement for working on it. Many people wanted to see it enacted. And many people could testify to the changes it would make and why it would work.

Since the curricula of law schools tend to mirror law, it seems clear that as behavioral principles increasingly influence the law, so will we see more concern with their application in designing courses.

B. *Curricular Effects*

Of course, a law school's curriculum continually changes without external or committee-inspired planning because of what its professors do (regardless of course labels). Further, faculty calibre is more important that bulletin logic.[48] Also, to agree with Professor Gellhorn, the most important single factor for the success of any curriculum probably is the faculty's enthusiasm for what is taught[49] (a factor which makes reinforcement from such men more significant).

However, the above observations do not transform all "outside" curricular suggestions into officious intermeddling. Enthusiastic professors may at least occasionally respond to suggestions. Hence, the text for this day and this decade. Law teachers should examine the conceptual structures and administrative practices relative to their fields of law or to social problems which will form emerging fields of law, and ask whether existing contingencies of reinforcement are the most likely ones to shape the behavior called for by prevailing or preferred values. If this were done, the result would be many promising new concepts, new organization of ideas, and new legal processes.

Examples already have been provided of how a jurisprudence incorporating behavioral principles has made inroads in our law and, thus, without much professorial initiative, must ultimately be worked into the curriculum. However, it should be illustrated how a law professor, viewing a field of law from a behavioral perspective, might come up with a new emphasis and new approaches, even before that area of law had fully embodied reinforcement principles. Take a course in torts as an example.

---

[48] For an elaboration of this theme, as well as some of its limitations, see Kelso, *Curricular Reform for Law School Needs of the [illegible]*, 21 U. MIAMI L. REV. 526 (1967).

[49] Gellhorn, *Commentary*, 21 U. MIAMI L. REV. 536 (1967). "If the curriculum as such is not the most important concern of [illegible] educators, what really should be important to us? I think it [illegible] professors be *excited*. They ought to be terribly concerned about what they are doing. [illegible] Then each teacher should communicate his concern and his enthusiasm [illegible] in the work that he is doing with students." [illegible]

If asked to prepare a set of materials on torts, one might well begin by deciding that it apparently is true that neither the threat of a punishing judgment nor the possible reinforcement of a tort recovery influences drivers (other than causing potential defendants to buy insurance). One might well conclude that at least the automobile branch of tort law is a compensation system. Thus viewed, it is part of the nation's overall health and welfare system — a system designed to protect people from punishments or from the lack of reinforcers that ordinarily are enjoyed by others. Perhaps the field, as so viewed, deserves a new name, such as Injury Prevention and Loss Allocation.

Regardless of whether a new name be chosen, the perspective limits concern with states of mind, and shifts attention to the structuring of risk distribution processes and to proposals for reducing accidents and the severity of injuries they produce. With respect to risk distribution processes, it seems clear that they should provide prompt compensation for actual injuries, without generating excessive litigation, and should include some assurance that recoveries will be similar when accidents, injuries, and losses are similar — an assurance not present in the system now operating. The requirements all point to the emergence of some kind of compulsory insurance plan.[50]

The problem of getting safer roads, cars, and drivers elicits several possible answers. Drivers who have not had accidents or traffic violations for a certain number of miles could be permitted to purchase licenses for less than is charged to others. They could be given a safe driver sticker of some sort. Their insurance rates could be substantially lowered.

To promote safer roads, the federal government should contribute bonus support to states which can demonstrate successful efforts to build safer roads, or to operate roads with better safety records.[51] Governmental agencies should be encouraged to experiment in the design of safety devices. Perhaps intersection signals could be constructed which warn whether or not a car is in the crossing path within, say, 300 feet. These could warn the drivers on the "stop" street by turning on a red light, and warn the preferential street driver by turning on a caution light. With respect to the building of safer cars, the federal government is in the process of taking some worthwhile steps. The government might also consider the preparation of a "safe car" list, noting with statistics what kinds of injuries were suffered in comparable accidents in various kinds of cars.

---

[50] The Keeton plan for self insurance would reinforce injured persons by prompt payment of damages and eliminate the punishing aspects of litigation. Keeton & O'Connell, *Basic Protection: A Rebuttal to Its Critics*, 53 A.B.A.J. 653 (1967).

[51] Only belatedly has the federal government recognized the consequences of not offering reinforcement for safe design in road building. Representative John A. Blatnick (D. Minn.), chairman of a House subcommittee investigating highway design defects, has reported that thousands of miles of interstate highways are lined with faulty guardrails, poorly constructed median barriers, badly placed signs, light poles, and other obstacles. Indications are that as many as 20,000 deaths may have been caused by such hazards. Miami Herald, Aug. 17, 1967, at 26A. The federal government has indicated its willingness to pay for 90% of the cost of corrective programs, as it did for construction. The initial use of a reinforcing bonus for safe design would have been a lot cheaper in money and lives.

Many other experiments could be considered or tried in each of the areas noted above. This writer does not propose to create a comprehensive list because the only purpose here is to point out that once the new perspective is used, the interests and responsibilities of law professors and their students broaden out to include something other than rules for litigation.[52]

To conclude the sojourn into torts by moving beyond automobile accidents to other injuries, the application of behavioral psychology would result in the asking of new kinds of questions about various causes of action. For example, rather than wonder what conduct should be actionable if it caused certain kinds of injuries, the question should be, "What behavior and institutions do we want to encourage by reinforcement so that injuries will be avoided, and, if they occur, will promptly and fairly be compensated?" Thinking of this type has already led to the extension of absolute liability into many areas where the social cost of injuries can be spread through insurance.

Leaving torts, and returning to the curriculum as a whole, it has already been observed that law is shifting from punishment to reinforcement as its most relied upon instrument of social control.[53] If that long range trend continues, it becomes ever more imperative for legal educators to consider whether the education they provide is preparing men only for legal processes in which the issue is whether punishment shall be imposed, or whether law graduates will also be able to play a significant role in developing and administering reinforcement programs designed to harmonize social and legal processes. If lawyers are to be more than the mechanics for a system gradually being replaced, if they are to be the architects for systems gradually coming into being, the law school curriculum must be revisited.[54]

---

[52] For example, in my opinion [illegible] approach were taken in the development of professional responsibility [illegible] could engineer changes in values and attitudes as well as in knowledge, a result apparently not now being accomplished. COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY, PROCEEDINGS [illegible] (1965).

[53] See note 39 *supra*.

Professor Gellhorn has suggested that we as teachers may have less influence over our students than we might hope or think we have.[55] But it is the suggestion of the author that research and course design as described above would help create the enthusiasm which Professor Gellhorn believes to be the most essential ingredient in good teaching.

CONCLUSION

This article can be summarized rather concisely. The main tenet of the educational technology supported by behavioral psychology is as follows:

> To maximize behavioral change, present stimuli in an environment such that many active responses are made which can be observed; reinforce those which approximate desirable behavior, gradually decreasing the tolerance (or, to put it another way, gradually increasing the standards for performance), as reinforcement is shifted from a continuous to an intermittent schedule; but do not punish erroneous responses, because this makes the whole situation aversive, thus producing undesirable emotions and unpredictable avoidance behavior.

This formula suggests many reforms and experiments in legal education's methods, curricula, programs, administrative structures, and procedures. Likewise, it suggests avenues for research in improving the law and its administration. It could well support an as yet unformulated new jurisprudence, one which combines practical and theoretical in ways more immediately apparent to beginning law students, and more useful to society.[56] For when law is viewed essentially as a contingency of reinforcement for behavior, we are led beyond legal words to the actual behavior of people in framing, administering, and reacting to law and law men.

Thirty-five years ago, Karl Llewellyn urged that we should study the contact point between law people and law-affected people.[57]

---

[54] In addition to more specialized courses, this may well include provisions for courses or even non-degree programs (or, at least, non-LL.B or J.D. programs) designed to help insure that satisfactory legal services are readily available at a reasonable price to all persons who can benefit from them. *See* Q. JOHNSTONE & D. HOPSON, JR., LAWYERS AND THEIR WORK (1967).

[55] GELLHORN, *supra* note 49, at 538.

[56] A jurisprudence concerned with implementing the reinforcement principle rather than devising punishments must be empirically oriented toward behavior—the kind of behavior that many lawyers encounter day to day. This has been described elsewhere as a "lawyer-oriented" jurisprudence, and it has been noted how it calls for the creation of permanent empirically oriented research centers at our law schools. Kelso, *Steps Toward a Lawyer Oriented Jurisprudence: Problems, Promises, Procedures, and Pitfalls*, 19 U. FLA. L. REV. 552 (1967).

[57] Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), *reprinted in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).

I quite agree. Now, however, there is a scientific framework within which better to understand what it is we are observing; there is a guide for the kinds of things to observe and a map to help us understand what it is we have seen.

THEORIES AND PRACTICES IN THE LEGAL PROFESSION

WALTER PROBERT* and LOUIS M. BROWN**

I. PROLOGUE TO NEW INQUIRIES

Law and Lawyers in a Changing Society

The time is ripe for jurisprudential theory to take account of lawyers. Numerous signposts indicate that we are in the process of developing such theory. More than scientific and philosophic interest is involved. While sociological jurisprudence and legal realism point the way naturally to anthropological studies of lawyers and lawyering, other significant developments indicate that the resulting theory will not just be a continuation of old styles.

We stand on the threshhold of an accelerated evolution not only technologically and sociologically but also intellectually. Revolutions of blood can take place without drastic changes in law or legal system. Modern revolution—accelerated evolution—can take place without loss of blood but perhaps not without drastic changes in conceptions of law and ultimately in law itself. Both nationally and internationally minorities are finding ways of exerting power that threatens traditional conceptions of law and the social structures which are preserved by law. While poverty may be an issue of politics, its deeper socio-political significance looms larger. Civil rights strain at the restraint of politics. Traditional conceptions of law are bulging at the seams.

So clear do the clash of values loom before us that we may tend to let the vision pull us beyond our knowledge and our reason. Law and especially legal theory have in our culture placed a high value on reason. The values wax impatient at slow and often obstructing analysis. Analysis and reason and even data do not give quick enough promise of a better world or society.

Yet in the end, any social structure old, modified, or brand new will have to be held together by law and it in turn by reason which allows the deeper emotions and needs at least to transcend the chaos of details and otherwise merely conflicting demands. In all this there will continue to be lawyers, even if a changing breed to work with changing law stuff. Developing legal theory is necessary at all levels, for those who would understand what they are facing, working with, or trying to change.

---

*Professor of Law, University of Florida.

**Professor of Law, University of Southern California.

We believe that lawyers are much more a facet of legal process than jurisprudence or other legal theory has yet postulated. Our main purpose here is to show how that is so. We regard our inquiry as a tentative probing, or as a kind of scouting expedition. We hope also to suggest something of usable technique for those who would philosophize, observe, or otherwise study this aspect of law-society that has until recently been neglected in legal theory.[1]

Lawyering, as a phase of law in action, has been neglected because what lawyers do is felt to be anything but law or even law in action. What lawyers do has always literally been thought to be the practice of law. Law's image has been that it is external and above all individuals or groups, even governors. Legal realism's exposure of the man in law did not just prove that the older image of law was dying. It set some thinkers to increased effort to prove that law was or could be somehow transcendent of individual wish or volition.[2] Still others could see more clearly the social goals or values that had been obscured in the older dogma. So, if judges should not be seen as law, how could lawyers be seen within that concept, particularly since lawyers seem to work mostly for individual ends?

Legal realism may be said to be dead,[3] but a new intellectual, philosophical, and behavioral science interest has developed which no longer allows the luxury, if it was that, of the prevalent symbolism of law as merely transcendent. That interest concerns the way that language and symbolism enter into behavior and observation to qualify and often determine what we think, believe, and observe and how we evaluate.[4] We have moved far beyond the early phase of "semantics" and the psychoanalytic trinity which in opening the door to new insights tended to make nonsense of reason and almost anything that we said or did. Not that we have yet developed the intellectual calculus which will cancel out the risks lurking in ignorance to leave the beautiful equations of full knowledge. We are just beginning to be able to deal, if only in academic moments of contemplation, with the ambiguities and other kinds of symbolic conflicts that at least obstruct communication and understanding.[5]

---

[1] Both authors participated in the Conference on Lawyers' Roles and Skills, Greystone Lodge (Denver Law Center), Sept. 16 to 19, 1966 (Report forthcoming). Also present were several prominent law teachers, sociologist-anthropologist experts, and Foundation representatives. In discussing goals of social improvement, especially with respect to indigents, pessimism was expressed as to the roles of legal education and attorneys. Currently, the legal profession is coming under fire from several directions. See, *e.g.*, CARLIN, LAWYERS' ETHICS (1966); CARLIN, LAWYERS ON THEIR OWN (1962); SHKLAR, LEGALISM (1964). For a more optimistic discussion of lawyering and its public responsibilities and attunement, see STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 56-62 (1966), which also contains in the footnotes a useful bibliography relevant to many of the points of this article.

[2] R. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[3] Legal realism is not so much dead as assimilated. See STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 70 n.271 (1966). *Cf.* LLEWELLYN, THE COMMON LAW TRADITION 508 (1960), and Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317 (1960).

[4] Julius Stone brings semantics to bear on what he calls lawyers' reasoning, meaning really in the perspective of the common law. See, for instance, his LEGAL SYSTEM AND LAWYERS' REASONINGS 9-10, 29-41 (1964).

Ambiguities will remain, of course, as will misunderstandings of all sorts. But at gross levels we should be able to see that despite disputes about the meaning of "law," for instance, such inquiry is not a fruitless task if the meanings of law be searched for in smaller orbits. We have learned in scientific measurements to take account of the position and motion of the observer in relation to the position and motion of what is observed. Now we can see that in a sense the process of observing law involves movement through intellectual space via language vehicles which themselves must be observed for their locations and velocities.[6]

Thus, a major theme of our analysis will be that views of law will vary as we move from perspective to perspective and that there are various perspectives and observation posts within the legal profession as well as outside it.[7] We want to begin to expose the range of variations. We must then emphasize that the language vehicle used in one perspective is not necessarily moving at the same velocity or serving the same functions as the similar looking language vehicle in another perspective.

Before commencing this theoretical movement, we wish to challenge a dichotomy that has helped to block travel from perspective to perspective within the legal profession. We speak of the distinction between theory and practice. Every person has his practices, his approaches to problems and situations, as does every group. Intertwined with the practices at all levels are theories, even if partially inarticulate. A person could not act without theory. He could not walk, read, or drive an automobile without generalizations in living habits and assumptions that make it reasonable to pursue the value of each goal-directed act. Certainly, once you start using words, you generalize, you theorize.[8] As has been said, "The facts one dislikes are called theories."[9]

---

[5] Language, beyond the semantic dimension, is now seen as a facet of human behavior which is, if not the key, at least the lock barring the way to significant empiricism and interpretation of what is observed, reported, and evaluated. See J. L. Austin, Philosophical Papers (1961); Korzybski, Science and Sanity (4th ed. 1958); Langer, Philosophy in a New Key (1947); Morris, Signs, Language, and Behavior (1964); Northrop, The Logic of the Sciences and the Humanities (1947); Wittgenstein, Philosophical Investigations (1953).

[6] F. S. Cohen, *Field Theory and Judicial Logic*, 59 Yale L.J. 238 (1950); F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935). Concerning general theoretical background, see Northrop, The Logic of the Sciences and the Humanities, especially ch. 4 (1947); Wittgenstein, Philosophical Investigations (1953); F. S. Cohen, *The Relativity of Philosophical Systems and the Method of Systematic Relativism*, 36 J. of Philosophy 57 (1939).

[7] We have been looking for law out "there," Shklar, Legalism (1964), rather than in people, Cahn, *Law in the Consumer Perspective*, 112 U. Pa. L. Rev. 1 (1963), i.e., in the perspective of individuals as "consumers" of law.

We do not deny that law teaching and legal theory often fail to take account of lawyer activities. Indeed we insist that they have been more than simply remiss. However, it is not simply that law teachers or some of them are merely theoretical and that lawyers are only practical. It is incorrect to say there is no theory operating at the level of lawyers' practices. To a person outside the lawyer perspective, their theory can be seen permeating their activities.[10] Furthermore, outside the law academic perspective, individuals inside can be seen engaging in practices of very definite kinds. So, even though the distinction between theory and practice touches a significant chord, pointing at two often widely varying perspectives, it fails to suggest the possibility of a bridge between two spheres of theory-practice.

We would encourage those who are most experienced at articulating their own theory to bridge the gap and attempt to articulate lawyers' theories, not just to develop a pragmatic jurisprudence, but the better to understand other legal institutions and the rest of legal theory. Lawyers themselves might come to know what theories they are using and be able to engage in useful conversation regarding their practices and values with those who may best see them sympathetically even if sometimes critically.

Levels of Theory and Practice

Now to elaborate the suggested direction of inquiry, we make several admitted hypotheses, not fiats. The legal profession is made up of several significant perspectives or frames of reference. Sociologically speaking they are interacting and at times conflicting groups, not just one commonly based group. Each group has "its" view of law and legal process which is somewhat distinctive from that of the other. The distinctiveness is camouflaged by a seemingly common vocabulary. However, the cultural nature of a particular subgroup in the professions, its traditions, goals, personalities, experiences, roles, and so forth does much more to affect the legal concepts as they are used in *that* group than vice versa, except where the groups traditionally interact.

---

[8] Northrop, The Logic of the Sciences and the Humanities ch. 3 (1947).

[9] F. S. Cohen, Book Review, *Lewis: An Analysis of Knowledge and Valuation*, 61 Harv. L. Rev. 1469 (1948).

[10] *Cf.* the discussion of lawyers' ideology in Shklar, Legalism 1-28 (1964).

To be more specific, the legal profession has at least these groups: practicing attorneys, judges, and professors of law. Judges and attorneys talk alike and possibly mean alike in courts. Professors and potential attorneys talk alike in law school. But the professorial group has a different anthropological nature from the attorney group. Their images of law, for instance, are bound to be different because they have such different roles. Of course, the professors think of themselves as teaching law to future practitioners. The charge is made that much of what is taught is "theoretical." This does not so much refute the notion that law is in fact taught, as it does the notion that law is taught as seen from the practicing attorneys' perspective.

We are not saying that the professorial group is therefore wrong. It may be that their goals are socially desirable, but it may also be that the status structure of the profession, for instance, prevents the young law graduate from fulfilling those goals, as much as he might have wanted to in law school. Consider the status and control of the professor with respect to the student while he is in law school. Consider the drastic change that takes place upon graduation or shortly thereafter. The new lawyer comes under quite different influences and controls, which seem to include to some extent a degree of hostility to the now "outside" professors. What we have may be looked at as a power dynamics between these two groups, the professors' greatest influence being during a formative but comparatively short period. The conclusion does not have to be "change legal education"; it could just as well be "change the structural dynamics," if either is possible.

There are further distinctions to be made. It may be that the practicing attorney group should be divided further into smaller groups, for there seem to be widely varying perspectives of law and legal process therein. There is good reason to believe that the problems and roles of the interviewing counselor are sufficiently different from those of the interviewing trial lawyer to allow a wide variation in the use by each of key legal concepts, for instance. There is certainly evidence of a class stratification within the practicing attorney group. Many other distinctions could be pursued.[11]

Nor is the professorial group as one. The bulk of law teachers pursue their fields and specialties according to the articulated leadership of those who prepare casebooks and write Hornbooks, leading treatises, and law review articles. A particular theory of law is implicit in these leading presentations, and they are leading only partly because they show expertise in determining "what the law is." There is data aplenty in faculty dynamics to support several worthwhile novels, let alone a scientific sociological study. The membership of the American Law Institute, for instance, reflects the sociological structure within the professorial group as well as within the practicing attorney group much more than it does scholarly status from a university community point of view.

---

[11] Some distinctions are suggested, *infra*, regarding roles and kinds of practices. Further distinctions have been drawn elsewhere as to status lines within the practicing attorney group and as to the interrelationships of status, client involvement, practices, and values. CARLIN, LAWYERS' ETHICS (1966); CARLIN, LAWYERS ON THEIR OWN (1962); SMIGEL, THE WALL STREET LAWYER (1964).

In any event, the practices of this part of the professorial group are as expedient in their own way as are those of the attorney group: in that context, in that frame of reference, highly practical. While less so than in previous years, the law image is rule oriented and rules are explicated in appellate opinions, statutes, to some extent regulations—and also leading casebooks and commentaries. If one reads attorneys' briefs and especially if one looks at the theory obviously underlying bar examinations, which are often drafted by attorneys, it would seem that the view of the practicing attorney group is exactly the same as that of the dominant professorial group. Such is not necessarily the case, although we are not stating that the perspectives of these groups are entirely different. They still have enough common experience and views to justify definitional togetherness. But bar examinations are directly or indirectly controlled largely by judiciaries, after all, and that professional group has much in common with this portion of the professorial group. Insofar as bar examinations are controlled by members of the practicing attorney group, it would seem unfair for examinations to test law graduates in some other perspective than the one they have perhaps temporarily assimilated, and such an exam serves as well as any other as a selection device. Further, while the bar examination provides a pressure on this portion of the professorial group, keeping it from moving closer to the perspective of the attorney group, assuming any real desire to move in that direction, it provides a greater pressure keeping the other portion of the professorial group from moving perhaps farther away or engaging in uncontrolled experiment that might be subversive to the attorney group.

Many less in number are the members of this other part of the professorial group who work away in the fields of jurisprudence and other kinds of so-called legal theory. They often rebel at the notion of teaching "law" in the perspective of their colleagues, although they are to be found teaching traditional courses perhaps even in a fairly traditional fashion, a fact that bears some exploration in itself.

Still, all in all, they tend to identify less with the attorney group than do their colleagues. They take on more of the markings of the academic community generally, whatever the reasons. Now that does not make them any *more* theoretical than their teaching colleagues in the law school, although their colleagues will think so. We find possible status lines within the entire legal profession in terms of who is the "most theoretical," lines that are related to those found in society generally. All this might be translated in terms of threat to group solidarity. For perhaps that very reason, the theory of this portion of the professorial group is the least liked by the rest of the profession. Often this kind of theory is not made up of the sort of statements that "insiders" would make; they go to extremes in purveying other than professional values, perhaps as an intellectual gambit, perhaps for the sake of social crusade, maybe as a matter of intellectual fervor, for the sake of science, pure theory, what have you. As with any other theory-practice, for our present purposes, it is a mistake to ask merely whether these theories are wrong. Rather the attempt should be to articulate the particular theory beyond any author's or speaker's own version into his sociological and psychological frame of reference. By this process we could actually derive more faithful versions of the various theories.[12]

What has been said does not mean that the theories of this group could not be used by the other groups. Obviously they have been used to some extent; certainly that is true regarding legal realism, just as it continues to be true of other so-called theories. Anyone who has tread in all the theory-perspectives, or at least those named here, knows full well that these theories might be even more used. But there is a clear lack of communication. This does not mean that these individuals do not write well or that they write absolute nonsense, although certainly that may sometimes be true too. What it means is that there are semantic psychological-anthropological variations that tend to block communication in *both directions*. It is not, on the other end of it, that these professors cannot understand the attorney group; they do not seem to attempt to do so.

---

[12] The best evidence of these internal dynamics and rifts was the special meeting of teachers of "legal theory" held immediately following the meeting of the Association of American Law Schools in Chicago, Dec. 30, 1965. It arose out of an apparent feeling that law schools were becoming increasingly anti-intellectual and were being given over to the interests of "vocationalism." See minutes of meeting, Dec. 30, 1964, American Section of International Association for Philosophy of Law and Social Philosophy. The society adopted a resolution entitled "A Resolution Concerning Anti intellectualism in Legal Education," which is reproduced in a somewhat weaker form in 18 J. LEGAL ED. 63-64 (1965).

Legal theorists are subject to bitter attack, often out of print, by another group of theorists, namely, the "empirically" oriented advocates. To some extent competition and power dynamics are involved, or in Shklar's terms, "variant ideologies," that according to her are not likely to be brought together by any amount of analysis. See generally SHKLAR, LEGALISM (1964). It would be difficult to find any criticism of general legal theory more critical than this work by a political scientist, a self avowed "liberal."

How can any thoroughgoing theorist ignore such a large portion of the happenings in the law area? Reasons have been suggested already. Partly it is because of the strong underlying image which makes attorney practices appear irrelevant. But that is not enough of a blockage to account for the antagonisms between these groups, to the extent they exist. Of course there are personality types within this portion of the professorial group who shrink from lawyer pragmatism, perhaps on purely idealistic grounds, and make it their role to change those practices. But one of the very points of this section is that this cannot be accomplished merely by lecturing to a group that will not listen.

The data is there. Its collection and the implications to be drawn from it in the process may be highly useful to all portions of the profession. Much of this data is accessible to the most theoretical amongst us, simply because he is a member of the profession. Who in this group has paid close attention to the meetings of attorneys, the institutes, continuing legal education series, and the writings which come out of these places? Much might be drawn from these sources, but there are deeper levels which remain fairly inaccessible within the attorney group. What do attorneys do in interviewing, in making decisions, in all the variations that make up actual practice? To those attorneys it may be said that if they want law school to be more practical, they should take a leaf from the book of psychiatrists who share with each other, including those in academic psychiatry, case histories from which new theories and practices emanate. To those in the professorial group who have no desire to make legal education into the image of the attorney practices, let it be noted that their inquiry need not be in the name of that kind of practicality. Let it be in the name of throughgoing theory.[13]

---

[13] For significant contributions to a theory of lawyering, see FREEMAN, LEGAL INTERVIEWING AND COUNSELING (1964); HART & SACKS, THE LEGAL PROCESS (tent. ed. 1958); WEYRAUCH, PERSONALITY OF LAWYERS (1964); Krastin, *The Lawyer in Society — A Value Analysis*, 8 W. RES. L. REV. 409 (1957); Llewellyn, *The Modern Approach to Counseling and Advocacy — Especially in Commercial Transactions*, 46 COLUM. L. REV. 167 (1946); Llewellyn, *The Normative, The Legal and the Law Jobs*, 49 YALE L.J. 1355 (1940); Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961); Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL ED. 301 (1961). One of the authors, Louis Brown, conducts courses at The University of Southern California Law School on the Jurisprudence of Lawyers' Operations and on Preventive Law, in both of which courses he has prepared mimeographed materials.

213

II. EXPLORATIONS UNDER THE COVER OF LAWYERING[14]

Moving Into Position

With small exception, legal theory continues to attempt to see how law works by looking at a still shot of a moving process. Should we try to paint such a two dimensional picture, we would discover not only that lawyers were helping us to paint the picture, but also that they were in the picture watching it being painted. We ourselves can move into the picture only by understanding something of the way in which such a painting can come to exist. Our jurisprudential picture is painted with words and that is the material which is ignored. To see how lawyering relates from the inside to law as it is seen from the outside, it is helpful to perceive relationships which can be seen only by adopting the lawyers' attitudes and vocabularies, that is, by obtaining a grasp of lawyering dynamics by a kind of observation-feeling process.

Thus the question is not what is law, not even what is the legal process, but how is law felt, used, transmitted, or affected within the community of lawyers who, in a way, have the closest contact with law dynamics and its many aspects and complications. To get that feeling involves a special vocabulary consciousness. By and large we are not conscious of verbalizing, we just do it. At first, becoming formally logical involves becoming conscious of word or symbol usage and of certain rules of usage. A class in grammar calls up a related consciousness. It is possible to be logical and to be grammatic without thinking how to be that way. But in order to truly observe a group or community—even if to generate theory about that group—it is first necessary to become intensely conscious of the vocabulary rules of that group. One may learn a new language without the aid of a text, but he will at first be highly conscious of the strangeness of the words used. Remember well how a beginning law student is acutely aware of the vocabulary which confronts him—and how confused he is.

Those who write jurisprudence and legal theory suffer from a related disability. They know *a* vocabulary of law only too well, that is, the vocabulary of those who are law-trained. The silent assumption seems to be that certain terms appearing in all vocabularies of law mark them all as the same, so they do not look under the camouflage. On the other hand, those who are not law-trained are conscious of the markedly different vocabulary of lawyers. Yet sometimes the sophisticated ones tend to mark the vocabulary off as a jargon which has no implications for either lawyer behavior patterns or the phenomena of law.[15]

---

[14] For convenience, instead of the phrase "practicing attorneys," we will henceforth use the term "lawyer(s)."

These are not just admonitions about semantics, but attempts to point out a varying behavior pattern. This is a call for observation which includes as much as possible a total sensitivity to what is at least a partially alien institution for most nonpracticing lawyers, wherever their observation posts, even if within the legal profession. The result will ultimately be a sensitivity to the way the observed persons are behaving. Behavior is a complex of words inseparable from other actions. In this approach, you do not ask for definitions, for then you get a different kind of behavior and at best abstract and distorted recall. Rather, it is preferable to obtain spontaneous definitions, that is, definitions in use in behavioral situations. People generally use words spontaneously. The spontaneities are at least as important as the planned and thus often artificial definitions. They form the base for a dynamic, involved analysis rather than a static, merely logical dissection.[16]

Commenting observers often do not see the drama or the game from the inside. The actor who is within may wrap himself in his role and yet glimpse and feel the outside world from time to time. A practicing lawyer is perhaps wrapped up in his law role, still able at times to catch glimpses of law on the outside, but unable to execute his role except as he sees it from within. How can we presently expect him to see his role or roles as those in other perspectives see them?

The metaphor does not say that we all must ultimately define and see law and facts as this or that lawyer defines and sees them in action. But the internal realities are somehow related to the external realities. The legal realists apparently tended to see mostly the external realities of the judicial process, having been somewhat influenced by seeing a few of its internal realities. Rules tended to disappear as they watched, yet inside the process they are still clearly visible.

---

[15] *Cf.* Shklar, Legalism (1964). She seems to have been drawn to an opposite extreme. In an often admirable commentary on the limits of current legal theory, including that of lawyers, she fails to recognize the diversities that do exist, even if they are not predominant. In short, she overgeneralizes.

[16] Thus there may well be a significant validity to the techniques of an observer, familiar with two legal cultures, who engages in only semi-directive participant observation in one of those cultures for specific conclusions that are hypothesized as to the other. See Weyrauch, The Personality of Lawyers (1964), observations on the German legal profession extrapolated at times to the United States. Compare the possible static use of questionnaires which may come very close to a quest merely for definitions. The reporting participant observer takes the risk of being regarded as automatically biased if his skill as an interpreter is not otherwise shown, especially if his conclusions raise defensive hackles. Questionnaires, too, can be interpreted in a biased fashion. If science is to be seriously used in socio-legal research, research conclusions must be cross checked, no matter what the technique.

A golfer can use a golf ball without knowing all about how it works. He might conceivably know more if he became a realist and took the ball apart. He would see how the inner layers and the inner core related to the cover and how the internal potential energies made up, in a sense, the ball which could be unleashed from without. The legal realists attempted some such analysis of courts and law, but they left off the cover. They continued to comment how silly the law and the courts looked without their cover. They were, of course, trying to change the manner in which the courts and the law functioned, but the change for awhile was attempted by driving away with a club at a ball that had no cover.[17]

Proximity to Litigation

There are practicing lawyers who handle personal injury claims from beginning to end. There are also firms which specialize in personal injury claims and allocate subspecialties to lawyers within the firm. The view of law and facts and lawyering function will vary as the involvement varies. The interviewing lawyer will screen individual damage claims and determine that many cases are clearly not sufficiently ripe for "the full treatment." Some of these unripe claims will be rejected but some will receive a short treatment, perhaps as a favor or out of sympathy, maybe with a sense in the lawyer of his influence, by telephone calls, or letters. He may say that these briefly handled claims contain no legal problem and do not need a knowledge of law for their handling. The observer not yet involved will *feel* that judgments on law were used in making these determinations.

The remaining situations are "probable claims." The interviewing lawyer will in these cases probe deeply into the nature of the injury, the extent of damages, how they occurred, the prospective defendants and witnesses, and so on. He may very likely say that he assesses these cases not in terms of rules of tort law but in terms of how "good" a case he *feels* there is. The less he has to do with trials, and especially the less he has to do with appeals, the more likely he is to say that law is rarely involved. On the other hand, the nonlawyer investigator, probably guided on his way by the interviewing lawyer, will be even less aware of the rules, confident in his feeling that he is better in his task for the lack of law bias which he observes in the interviewer.

---

[17] On the observations of this section, see generally R. BROWN, WORDS AND THINGS (1958), especially at 260, where it is stated that the study of language cannot be distinguished from the general study of culture. *Cf.* the observations in ch. 9 regarding Freud's technique as being oriented toward "listening with the third ear" to human behavior as "expressive language." See further REIK, LISTENING WITH THE THIRD EAR (1948); *SZASZ*, THE MYTH OF MENTAL ILLNESS (1961).

If the interviewing lawyer also does trial work, he will interview the client with his eye on settlement factors and to some extent on witnesses, evidence, arguments to the jury, and so on. To the observer this is law-related material, but to the lawyer it is not law—or at least not law school law. Of course, once in a while a claim is sufficiently questionable on "liability" to justify research, but since the worth of the claim is determined by many other factors in addition to liability, the "law" plays a minor role.[18] The appellate court specialist in the firm will have a different involvement and so a different perspective. Each could be somewhat annoyed by the other's seeming naiveté and his respective interest and emphasis on "controlling law" or "the more important facts and other factors."

Whether he runs the whole of the case or is only a trial specialist, the lawyer will spend only a part of his time on a case in trial. Much of his assessment and conversation will turn on settlement factors. Even regarding trial work, very little of that seems to concern law, rules, or legal concepts. The observer may feel that the case is intertwined with and circumscribed by rules of substance, evidence, procedure, and the overall formalities and traditions of the judicial institution. The lawyer's concern with the trial judge will tend to be in terms of the judge's disposition and leanings and how tough he is. The "rules of law" are bound to be felt against such matters. Not that the lawyer is oblivious to rules of substance and procedure; they simply occupy a relatively small part of his attention and conversation, although more so, of course, when he is involved in trial. In any event, he will be likely to say that what he learned in law school had little to do with his practice.[19]

Many a general practitioner can be found, particularly in small communities, who talks in a similar fashion about his law schooling.

---

[18] COUNTRYMAN & FINMAN, THE LAWYER IN MODERN SOCIETY 279-98 (1966); Lorry, *Settlement of a Personal Injury Claim — 10 Years in Retrospect*, 11 PRAC. LAW. 15 (1965).

[19] Claimants' attorneys will be more "law" conscious in areas where courts are making dramatic changes, as in products liability and governmental immunities. See Probert, *Creative Judicial Sanctioning: Application in the Law of Torts*. 49 IOWA L. REV. 277 (1964). Defense lawyers will operate quite differently from claimants' attorneys, perhaps often taking on some of the characteristics of business lawyers, discussed *infra*: Prosecutors and criminal defense lawyers, both private and public, would have more overlap with claimants' lawyers than with insurance lawyers. The considerable discretion available to prosecutors is likely to weigh heavily, for instance.

His *law* needs are felt by him often to be simple. Much of his work is routine, involving the use of form books or instruments pulled out of the files from records of past cases.[20] His law book references are largely on the order of dictionary checking and usually involve only the state reports, perhaps the state digests and perhaps "American Jurisprudence" or "Corpus Juris." He does not very often confront situations where legal rules present problems. His practice takes him to many forums other than those regarded as legal to the observer.

This is not to say that the general practitioner regards himself as any less a lawyer. Will the observer come to feel a different relation to law or sense a difference in the phenomena of law as he watches and himself becomes more deeply involved? He will see that the personal injury lawyer regards himself to some degree an expert lawyer. Many such lawyers, incidentally, see themselves as sort of ministers of justice rather than just of law, seeking to gain satisfaction of rights, fair compensation for injuries, and so on.[21] This lawyer doubtless has some sense of advocacy in settlement as well as in court, possibly during the interview also as it moves on toward probability. He is not advocate against the client but with him as he considers what "facts" he may *use* as advocate, how *his* claims would shape up and be influential in negotiation with the insurance company against a backdrop of considerations as to how a jury might be influenced in a trial. The rules and facts of the trial are contingencies playing into the better knowns of the moment.

A remote observer might see these individuals as lawyers who have lost their perspective of law. A personal injury claim, for instance, is not a "good case" except to a person who has been trained to look for the law aspects. Above all, the case must be able to stand up in court. Thus, the hypothesized lawyers are like individuals who say that the rules of subtraction and addition are of little value to them because when doing arithmetic they do not think or talk the way they did in grade school. It is, for further example, quite clear that we may use what we have learned about putting letters together into words and then into sentences and paragraphs without going back to the A B C's.

This is a reasonable point of response to the lawyer who is dubious about his law school training, but it diverts us from our task. It is not that these lawyers have "lost their perspective" of law. It is that their perspective on law has changed. Maybe it is even more apt to say, in the visual sense of perspective, that they do not have the former picture of law because they are, in a sense, *in* law, not outside of it. The rub-off principle indicates that what a person has most immediate and prolonged contact with will rub off onto his outer vocabularies and interests. Maybe we see here justification for the view that describes what lawyers do as "law-in-action."[22] To extend a figure of speech, maybe the observer in the "ivory tower" does not see the lawyer as being in law and the lawyer sees no reality in the view from the tower because the lawyer is in a "cave of gold."

---

[20] CARLIN, LAWYERS ON THEIR OWN 41-122 (1962), regarding "The Work of the Individual Practitioner"; Llewellyn, *The Bar's Troubles, and Poultices—and Cures*, 5 LAW & CONTEMP. PROB. 104, 116 (1938); Stumpf, *Continuing Legal Education: Its Role in Tomorrow's Practice of the Law*, 49 A.B.A.J. 248 (1963).

[21] See PIKE, BEYOND THE LAW 50-66 (1963), regarding "The Lawyer as Pastor"; CAVANAUGH, THE LAWYER IN SOCIETY (1963).

The Lawyer Ordering Process

One way to examine the differences in perspective between law teachers and practicing lawyers would be to observe what changes may occur in a young graduate. Suppose such a person moves into a corporate practice involving small to medium sized corporations. At first he will not likely deal directly with corporate representatives. His proximity to law school perspectives will affect the rate of assimilation of new influences. Probably he will be given packaged problems to research and translate into memoranda. He will later see that he was a subspecialist.

In discussing his research findings with a more senior member he may feel that his law calculations are merely arithmetic compared to the calculus with which he is confronted, although later he may realize that he has learned to deal with different levels of fact and different symbols of calculation.

Suppose as a simple example that the firm has corporation *X*, in the business of manufacturing, as a client. The corporation has been incorporated in another state, although a few of its representatives are in the state, involving themselves with other corporations that are clients of the law firm. The new lawyer is told by his immediate superior that the time has come to determine whether corporation *X* should register with the state corporation officer to "do business" in the state. If it does register, it will file an appropriate form along with a nominal fee. As he listens to his superior, he recognizes "facts" that fit into rules he studied in his business organizations class. He and his superior discuss the problem at this level and he believes that he has learned all the facts relevant to a proper decision and for research purposes.

He engages in careful research and analysis. He ultimately reports that according to the judicial tests, corporation X is doing business in the state and must register. There is a statute requiring the registration along with a penalty for noncompliance, namely, a disability to use the courts of the state for any suit.

---

[22] See Weyrauch, The Personality of Lawyers 1-5, 75, 79-81 (1964), for the suggestion that his are observations on law-in-action, somewhat in the perspective as suggested here.

He learns however that there are other considerations entering into the final decision. His sense of legal obligation suffers, for he feels that the client should be advised if it is to continue in violation and that it ought to register or cease doing business in the state. He learns that this is the kind of decision that the law firm will make, not being on the order of reorganization, merger, or contract negotiation. His sense of obligation suffers further when he is told that the statute as such is not controlling. Rather the decision involves a calculation of risk of penalty as weighed against benefits and losses coming from such registration. The superior decides not to register, for from the time of registration the corporation's profit and loss is to be reported to the state corporation office. Not only must a yearly fee be paid, but several yearly reports must be filed, opening up the details of the corporation business to the state's scrutiny. Further, there is then the possibility of state taxes being levied, and even though the tax probably could ultimately be avoided, the risks and burdens are not worth the possible benefit of being able to use the state court system. He is told that the same decision would follow even if there were a fine for noncompliance.

He begins to wonder why he was called upon for research at all, a wonder that is not lessened when he sees the memorandum that is to be filed. The memorandum does not seem to adopt his judgment on the law but indicates instead that it is not clear whether the firm is doing business in the state. His superior's overall judgment is proven by the test of time, for no further negative happening occurs to call for a reconsideration.[23]

This example, in microcosm perhaps, raises questions befitting any course in jurisprudence. An observer could argue that the superior has sat in judgment, his function encompassing that of trial judge and jury and appellate court. It does not seem that way to the young lawyer, however. It could be argued that in many cases which cross the lawyers' desks in this firm the lawyers are "making law" at least as much as any court. They do not see it that way, except that in rare cases they can envision the possibility of a future court fight which may necessitate the effort to make some "new law." Behind such effort will be a record in the firm's files which may not be evidence, but it will help in the argument. Furthermore, in other situations that are routine there will be a record which will be evidence in court, should that be necessary. Contracts are negotiated at least partly with an eye in that direction. Letters are written to preserve certain "facts" for the record and to keep others from being admissible under, for example, the parol evidence rule. Minutes of corporate meetings are written not just with a sense of corporate history but with a sense of legally relevant corporate history.[24] There is no feeling in the firm that such action is law-creating. They are merely exercising their expertise as lawyers, interpreting cases, statutes, regulations, letters, and other memorials while developing the facts of the client's business. In this way they may aid in charting the future course of the client's business along lines that involve minimal risk of negative sanction or impact, not only judicial, but of this or that official or administrative or taxing agency. The effort also is to minimize the likelihood of dispute involving the internal dynamics of the client or its relationship with its customers, suppliers, independent contractors, or what have you.

---

[23] While the textual example is not hypothetical, it is not meant as a paradigm case. It is meant to raise some typical questions, however. In this kind of situation action can be taken to avoid, not evade, the statute, and often the interpretation is not clear. The example raises lego-moral questions and suggests the decisional powers of lawyers, as elaborated *infra*.

Whenever disputes do arise, they are unlikely to be traceable to some mistake in legal judgment or action within the firm. No wonder the firm feels it is dispensing skilful legal services. In the same way, the financial condition of the company is dependent upon business decisions, not legal ones.[25] Our young lawyer grown older forgets his state of earlier puzzlement while worrying over this or that legal consideration upon hearing the senior partner's conversations in his nearby offiice. There seemed little of law in those statements, although he recognized that often they seemed pieces of advice designed to chart a client around legal pitfalls he himself had noted.

Of course, advice will not always be followed and facts will arise that were not or could not be predicted. Disputes may arise. A firm lawyer may then be involved in negotiation, perhaps on the order of mediation, or it may be advice on the order of advocacy, worked out in confrontation with another lawyer or battery of lawyers. Even more than in the personal injury settlement, the factors that enter into this kind of bargaining seem quite remote from anything resembling familiar rules of law or legal concepts. Yet the end product is usually familiar law stuff. If it be a contract, it will be in a form whose traditions find their bindingness as much or more in the stare decisis of lawyer practices than in those of a court, although courts have probed their merit long years past.

---

[24] Tarleau, *The Role of Corporate Minutes in Taxation*, U. So. CAL. 1957 TAX INST. 1.

[25] An omniscient observer might at times trace disputes or financial losses to lawyer judgments, but the nature of lawyers' involvement tends to immunize them from clear responsibility, a fact that contributes to the great difficulty in bringing successful suit against a lawyer in any area of practice.

It is increasingly popular to refer to contracts and other lawyer drafted or created instruments as nonofficial law making.[26] The lawyers in the firm probably do not see their work that way, even though a small scale "constitution" arguably is involved, with rights and duties recorded in the context of managed facts and expectations. Future happenings are likely to be tested against these provisions and not against common law rules. But the lawyer is working with familiar mechanisms. All the same, no matter how they are regarded within the firm, it is clear that contracts and other "codifications" of business, labor, government dealings with individuals, corporate charters, bylaws, and so on may have at least as large an impact and regulatory influence as some official pronouncements.[27] It would be interesting to know how lawyers at this level characterize these instruments and their involvement with or relation to law.[28]

Counseling and Other Roles

When an individual asks a lawyer to help him obtain a divorce, the lawyer may handle it routinely, seeking information simply to satisfy the grounds and the procedures. Where there is a contest, routine may be left behind and we have a situation closer to, even if not the same as, that of the personal injury lawyer.[29] There are matters of negotiation as to property allocation, support and alimony, future relations to the children, and so on. Yet apparently quite a few lawyers involved in such divorce requests look for more than legal rights and remedies. They see the possibilities of legal characterization, but they hear statements and infer facts that may seem not "relevant" to the observer. Perhaps to the lawyer, the lawyer problem takes on a different appearance from the law problem seen by the observer. Both may agree that the problem, whether to be called legal or lawyer, cannot properly be considered except in relation to what the observer might call the total psychological-sociological problem of the client. Yet the lawyer may say that his role is to consider alternative actions to divorce, based on whatever facts he can discover as being relevant to the client's current family crisis rather than merely relevant to a divorce claim. In helping the client to see the problem in this way he may suggest other alternatives, such as separation or conference with a counselor known for expertise in family relations. Yet he may himself give counsel to the client with respect to the implications for the client of taking one route or another, maybe also regarding the implications for the children or even the spouse, among others.

---

[26] HART & SACKS, THE LEGAL PROCESS 207-09 (tent. ed. 1958); KELSEN, GENERAL THEORY OF LAW AND STATE 137 (1945); STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 57-59 (1966); Cavers, *Legal Education and Lawyer-made Law*, 54 W. VA. L. REV. 177 (1952); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). See also L. Brown, *The Law Office — A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956). The analysis of this section feeds into notions of preventive law, *infra*.

[27] Whether advising or aiding business, labor, and other group factions and institutions, lawyers can be seen as "architects" of, or at least in, society, STONE, *op. cit. supra* note 26, at 59. *Cf.* at the other extreme, the lawyer as arch-conservative and perpetuator of social structure, SHKLAR, LEGALISM (1964).

[28] Corporate house counsel serve many of the same roles as the firm business lawyer, but separate analysis is called for as well. They are subject to different pressures, work with different techniques of influence, and probably view themselves more as law-business managers. Certainly they operate closer to the "facts" of the business activities they evaluate. See STONE, *op. cit. supra* note 26, at 57 n.183 for citation to several relevant studies.

[29] For reference to various relevant works, see FREEMAN, LEGAL INTERVIEWING AND COUNSELING 46-47, 56-68 (1964). See also Fain, *The Role and Relationship of Psychiatry to Divorce Law and the Lawyer*, 41 CALIF. S.B.J. 48 (1966), and generally O'GORMAN, LAWYERS AND MATRIMONIAL CASES (1963).

As the lawyer moves along on this route, it may seem to the observer that the lawyer is departing from his law role. Perhaps he sees the lawyer as adopting a psychiatric role, using in-depth interviewing, interpretations of conduct, attitudes, and even fantasies. He may take advisory steps and actions aimed at helping the client adjust to the reality of the current situation rather than continuing, say, to act out infantile regressions. Yet to a particular lawyer such action may seem inseparable from lawyering. Who is to draw the line at what knowledge discovered by psychology a lawyer may in fact have assimilated. We all know much more of psychology than our parents. Arithmetic was once the province of mathematicians we may suppose, but does it follow that the lawyer is not lawyering when he adds up the figures to reach the proper sum to be claimed for alimony or support?

Field research might reveal that this is not lawyering in the collective opinion of the Bar or even the collective opinion of the lawyers who handle such cases. Yet it might suggest an available or potential lawyer role. The authority of the lawyer's office, his personality, the submissive readiness of a client, the mystique to the client of law, its institutions, and norms all these and other factors may make lawyer counseling as good or better for certain situations than therapeutic or other kinds of counseling might provide in other situations.[30]

---

[30] Apparently many lawyers see themselves as engaged in the counseling role, sometimes coming close to the role of psychiatrist or clinical psychologist.

The observer might discover that the lawyer is quite unaware that anyone would believe he had departed from some preconceived role. Even his conversations with colleagues might not disclose any sense of deviation. It might be otherwise should the lawyer take on all the appearances of a psychiatrist, talking and analyzing as a psychiatrist would. The observer might in some cases conclude that the best results were not being achieved. He might then seek to promote a better lawyering theory and approach for such and a host of other camouflaged situations to be implemented by law school training. However, he should not therefore assume that he has observed something other than lawyering simply because his expectations have been surprised or even shocked.

This is not to say that anything done by a person who has a law degree or who practices in an office would be or should be looked upon as lawyering from within by the lawyer who is engaged in a specific transaction. Examples of nonlawyering easily come to mind: the managing of a community charity drive, running for political office, or investing in real estate, for instance. Many activities must be outside the lawyer role in the lawyer's mind as well as in most other perspectives.[31] Yet in another sense, many such activities are part of the lawyer's total business, his role as citizen or as entrepreneur, and so on. Then, too, political scientists may be interested in the lawyer and his political activities and his community influence. The anthropologist or sociologist might be interested in the lawyer's general status in society and his profession, or his educational background, his ideological attitudes, and on and on—while at the same time missing sociological significances of the lawyer by maintaining an observation post at too remote a distance.

The psychologist would justifiably argue that a lawyer's manner of dress, his sleeping habits, anxieties, and all sorts of psychologically relevant data go to make the lawyer what he is no matter what some other observer believes he is supposed to be. Of course, expectations of those outside of lawyering, particularly those of clients, enter as strong influences in lawyers' role images and behavior, often in un-

---

See situation reports in FREEMAN, *op. cit. supra* note 29, at 80, 88, 95 and the field survey at 231. As time goes on, lawyers will be better trained for this role because of the tendencies in legal education to give increased training in the psychology of the lawyer-client relationship.

[31] The Conference at Greystone Lodge, *supra* note 1, included considerable discussion of persons in "quasi-legal" roles, such as those in accounting firms, title companies, trust companies, insurance companies, and so forth. Dean Yegge of Denver Law Center offered the inventive notion that law schools might consider special training for such individuals. Medical schools train personnel for "health-related" activities.

noticed, that is, unconscious, ways.[32] So it is that psychological and anthropological theory justifies looking outside lawyering itself to generate theories on how lawyers do and ought to behave.[33] But so long as the observer collects data which is seen through the windows of a differently structured viewpoint, he may miss vital data that ought to enter into his theories and conclusions, whether of fact or value.[34] The observer may turn propagandist and attempt to influence the insider directly or indirectly to view law and his role differently. That of course involves all the same a power play. Such efforts are democratically acceptable. They may still be said to be not scientifically based and not necessarily the only realistic view or, in a policy sense, the best view. An omniscient observer may have his reasons for smiling.[35]

III. MAPPING PERSPECTIVES ON FACT AND LAW

Kinds of Fact

In common parlance outside the legal processes, we talk and act as if what we can observe, our observed facts, were there for all to perceive, were public objects. Careful distinctions as to the actual content of observations from different posts are rarely made, except when some conflict of goals motivates greater care partly as a rhetorical device, forcing into the open the relativity of individual perception. Even then the assumption is often that two conflicting views cannot both be correct. So it is at the trial, although certainly in that forum there are clues that observations are relative to individuals.[36] The more removed in the legal process we are from the trial court, the less likely there is to be a dialectic of words and actions to remind us of the variations existing behind the curtain of seemingly common words.

---

[32] See in this respect, CARLIN, LAWYERS' ETHICS ch. 4 (1966). *Cf.* the 1963 Missouri Bar Survey on the effect that being a client has on the popular opinion toward lawyers.

[33] WEYRAUCH, THE PERSONALITY OF LAWYERS (1964); Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, 57 AMERICAN J. SOCIOLOGY 121 (1951).

[34] The tendency will be to ask, "What is the lawyer's role?" Role is looked at as almost predetermined, "out there," but actually projected from the perspectives of the commentator. While the functional approach often brushes aside surface happenings as not being "real," within its multiple perspectives lawyers' roles should include serving the client, themselves and their associates, and so forth, as well as serving society in this or that preferred fashion.

[35] As an example of biased research technique, it would be possible to say that indigents are not getting "adequate" legal service and that therefore lawyers are not serving their "roles." Not to deny the merit of the wishful confusion, it is still not purely empirical. Many such wishes took the form of facts at the Greystone Conference, *supra* notes 1, 27.

[36] See notes 4-10 *supra* and accompanying text; see also Probert, *Courtroom Semantics*, 5 AM. JUR. *Trials* 695, 701-716 ([illegible]).

Philosophers and semanticists tell us to beware, and there are times when we are aware. But more important to our study are the high frequency comments on factual certainty, important to reveal the views that exist. These comments tend to disclose the prevailing perspective of a given individual or group. The interviewer in a personal injury case, for instance, probably sees himself as working with facts, that is, objectivity. However, since this is the most sensitive area in that regard, the more important it is for the lawyer not to take risks of fact dogma, the more likely he will be to seek corroboration. He is, then, potentially if not actually a fact skeptic.

Thus, where there is a live dispute, it is more important to have a fact skeptic on hand to raise doubts. Where the context is one of preparation for negotiation in a nondispute situation, it might be equally important to retain a fact skeptic, but the dialectic or negotiation may serve as well to give clues to fact disagreement. Contract negotiation is not usually influenced by the possibility of adjudication in the way that a personal injury settlement negotiation is. The unknowns in a contract negotiation are perhaps more apt to be influenced by "hidden agendas" that may be discovered by the sensitive participant and responded to even if not mentioned. Further, each side in a business setting negotiation may be beset by doubts concerning what is good for its side and what the future may hold for the business and economic risks involved.

Where the lawyering is unilateral, as so much of it is, there is probably less motivation for the client to hide his truths and less motivation or opportunity for the lawyer to discover disagreements on the "real facts." Furthermore, the unilateral situation allows the lawyer greater control over the "facts," past and future, so that he apparently may rely more on his own judgment of facts than may the litigational lawyer. He has more control over the factual process, or at least he can insure that the factual process contains the only significant facts which are legally relevant, such as those recorded in self-proving records and instruments.[37]

It is debatable whether he knows his client's facts in a way that would satisfy a philosopher or general semanticist, but the risks of ignorance can be minimized by a variety of lawyering techniques known as preventive law practice. In the preventive perspective, he is not resolving or curing disputes; he is preventing them by maintaining his client's legal health.[38] As compared with the cold facts of the curative lawyer, the preventive lawyer deals with hot, live, controllable facts. Cold facts are to a great extent signposted in history and less under the control of the curative, litigational lawyer.[39] Of course each litigating lawyer has some control over strategies and selections of factual evidence, but the past happenings he seeks to probe have created waves and ripples that reach to each bank of the litigating stream.

---

[37] See notes 25-28 *supra* and accompanying text on the discussion of the corporation lawyer.

[38] One of the authors has written extensively on a variety of facets of

By comparison, the risk of fact ignorance is much less to the decision makers, not because of control over past (litigational) or future (preventive), but because judges and juries have immunity to great degree from probing doubts of outsiders. Little wonder that statements of fact, and law too, continue to appear in largely confident phrasings. The least risk of fact ignorance exists in legal education and possibly accounts for the over-reliance on the coldest facts of all—frozen statements that bear little similarity to the dynamics of fact-finding found at the litigational level.[40]

Dissolving the Acid of Legal Realism

Probably a given individual uses law in different ways in different contexts. At one time he may tend toward the absolute, at another the relative, and so on. We have been attempting to explore dominant tendencies, but still it makes sense to speak of an individual's law perspective profile.[41] Legal realism, for instance, must appear to some extent in every lawyer's law perspective profile. There probably is less of fact skepticism than rule skepticism, generally speaking, although more of fact skepticism among trial lawyers than others. Such lawyers probably have changing perspectives regarding rules as they move through the various stages into trial. Earlier stages see an emphasis of facts. The trial forces the lawyer to some extent into the dogmatic law rhetoric typical of judicial opinions and much of legal commentary. Research could fairly easily uncover this lawyer's degree

---

preventive law practice and theory. See, *e.g.*, L. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. Pa. L. Rev. 940 (1956), and generally a symposium on preventive law in 38 So. Cal. L. Rev. 377-497 (1965).

[39] See L. Brown, *The Case of the Re-Lived Facts*, 48 Calif. L. Rev. 44 (1960). Rutter states that language sensitivity is crucial to the skill of fact management in *A Jurisprudence of Lawyers' Operations*, 13 J. Legal Ed. 301, 316-1 (1961). On the relationship of "fact sensitivity" to language behavior sensitivity, see Probert, *Causation in the Negligence Jargon: A Plea for Balanced Realism*, 18 U. Fla. L. Rev. 369 (1965).

[40] Regarding fact-skepticism, see further *Confronting Injustice*, in The Edmond Cahn Reader 265-321 (L. Cahn ed. 1966).

[41] The notion of personality profile is related, but even closer is that of epistemological profile, Bois, *The Epistemological Profile and Semantic Psychoanalysis*, 18 General Semantics Bull. 44 (1956).

of rule skepticism, whether he manipulates legal concepts consciously or unconsciously to accent evidential claims favoring his client. Outside of the generalities of a nuisance suit or the maxims of equity, the so-called rules of negligence law are about as malleable as any to be found. Some such awareness must rub off and affect the personal injury lawyer's view of rules generally. Do they view the rules of evidence on the same plane or as more a matter of trial discretion? Trial lawyers probably have a feeling for the locus of the real final judgments. It would be possible, then, to be part rule optimist and part rule skeptic or pessimist.[42]

A preventive lawyer could view rules in the manner of the legal realist, yet there may be pressures keeping that view low in his profile. He is called upon for legal opinions and advice, as an authority on law. While there are clients with whom he might speak in terms of probabilities or risks, it seems likely that most clients press for "yes" or "no" answers that are hard to resist. If so, this kind of lawyer is forced to a judicial kind of decision which a trial lawyer could more easily fend off by a "let's wait and see" attitude. Legal realism is low in the judicial profile, at least as we see it from outside, perhaps partly because that view places greater responsibility on an individual court or judge. If a judge sees himself largely as spokesman for the law, then there is similar reason for the preventive lawyer to take a related attitude. He, after all, would often feel *sole* responsibility for his law decision were he to take the view of legal realism.

Whatever the lawyer's profile of perspectives on law (and facts), it probably correlates to some degree with his role conceptions and attitudes toward clients and authorities. The product in turn probably correlates with behavior patterns of some kind. Whatever degree of legal realism exists on the inside, we may use the legal realistic perspective from the outside to some advantage in exploring further lego-social roles of lawyers.

Legal realism's greatest value has been its semi-anthropological approach to the judicial process, looking at it from several perspectives more or less simultaneously. The discovery was then that the doctrinal vocabulary attributed to courts could itself contain more than one perspective at a time. In a manner of speaking, at least it had that potential. Law doctrine was seen as normatively ambiguous, containing within itself an "ought-ness," an "is-ness," and a "must-ness." The idea is important to the view of this section, but it does not go far enough.

Legal realism stopped short because it was not fully anthropological. It did not involve *participant* observation. Further, while legal realism relied heavily on semantic analysis, it made a false assumption about language, perhaps because it did rely on semantics. But the assumption seemed to make inside observation unnecessary. Semantics was tied to logic for the heaviest attacks on judicial and commentator reasoning. As the argument went, since legal terminology was ambiguous, if a judicial decision was justified with that terminology, it necessarily begged the question. A deduction cannot validly be made from an ambiguous major premise.[43]

---

[42] See the discussion of the way rules vary in use as between advocates and counselors in Rutter, *supra* note 39, at 327.

Yet doctrine may look ambiguous from the outside and not be so from the inside. When the doctrine is used, it is no longer ambiguous. Furthermore, normative ambiguity is not a peculiarity of legal language at all, for a related kind of ambiguity pervades most of the ordinary language we use most of the time. It might as well be said that every time we use any word to answer a question we are begging the question. Suppose someone points to an object and asks, "What is that?" The question, according to the legal realistic analysis, cannot be answered without begging the question. The observer is having a unique experience, a novel experience in the sense that it is not *identical* with his or anyone else's previous experience. If he were to stick to logic, he would have trouble answering such a question. Very often the responses are spontaneous and are to be understood as being *psycho*logical. It is only a particular view of law that has said the judges must be logical. Perhaps legal realism denied only the logical rather than the psychological validity of a judicial opinion. There is a spontaneity to language usage which logic simply cannot capture.[44]

The Vocabularies of Law and Language

So, if we go a step beyond legal realism, we come to this: Looking at lawyers from outside, we see that the apparently single vocabulary which constitutes what we call legal language is actually several vocabularies, all of which may be represented in an individual's total legal vocabulary. This feature allows an individual to move through several perspectives without being aware of the shift and without being observed, except perhaps by the skeptic's eye. Likewise, the lawyer is free to use ordinary language, and here too lies the opportunity for unnoticed movement through several additional vocabularies. The lawyer uses both language of law and ordinary language in permutation. Judges and all of us do also. Legal language is not pure "legalisms." But lawyers are less restrained in the permutations than are judges; they have considerable mobility as to what thinking and talking perspectives they may adopt without being accused of leaving their area of expertise.

---

[43] Oliphant & Hewitt, *Foreword* to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1929).

[44] This point has been developed with respect to judicial discourse in Probert, *The Psycho-Semantics of the Judicial Process*, 34 TEMP. L.Q. 285 (1961).

We have said that the language has several vocabularies representing several perspectives. Wittgenstein used the figure of speech, "language games," to get at this idea.[45] His point was that the same word is used in many different language games. We have tried to show how this is true of the words "law" and "fact," for instance. And these particular words control the games playable with all law words and all fact words. To continue the metaphor, each person plays many word games (albeit deadly seriously at times) and moves with facility from game to game, the more so as his total vocabularies increase, not just in the sense of how many words, but how many ways he may be able to use given words. And of course, a person may and does play more than one word game at a time. What we call "by-pass ambiguity" in the sense of this metaphor is that one person is playing one game with a word and the other is playing another. The implications of the analysis go deeper than ambiguity, however.[46]

Interpretational Power and Decisional Analysis

Whether we speak of vocabularies, perspectives, or games, the maximum potential of a lawyer to parlay social into legal judgments, as seen from the outside, would be greater than that of a judge seen from the outside. This is not an easy point to accept. This maximum potential exists because every happening is, from at least one perspective, unique. Also, every rule, even a statute, is ambiguous even with respect to a given happening. The happening can be seen as unique and the rule can be seen as ambiguous *prior* to the point of decision and resolution. This point is not easy to see largely because of the habit of thinking that the last accepted interpretation, for example of a statute, whether one's own or that of a judge or other official, is *the* interpretation.[47] This is not to say that there is no rhyme nor reason to statutory interpretation, but it is to say that there is neither rhyme nor reason to the statute until it is placed in some perspective, whether that be the perspective from which it came or not. From a law perspective, the right interpretation is ultimately that of the final official decision maker. Short of such final decision making, a lawyer is often for many purposes the ultimate interpreter of statutes, regulations, common law rules, facts, and so on.

---

[45] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

[46] The word "vocabulary" is being used in a special way in the text to suggest that an individual's verbal use capacity is not tested merely by seeing how many words he can use in one way or another. Rather, a given word appears on several or many vocabulary lists. The given word has varying rules of usage as one moves from one perspective to another, from group to group, from relationship to relationship, or, in Wittgenstein's figure, from game to game. *Cf.* R. W. BROWN, WORDS AND THINGS (1958) and his discussion of categorization in THE ORIGINAL WORD GAME ch. 6 (1958).

[47] The premises of this paragraph are demonstrated in Probert, *Causation in*

Prior to some decision, then, the maximum potential is absolute discretion in the lawyer. No lawyer has such maximum freedom, although he may have it on some occasions when nothing is likely to happen to place his interpretation of law and fact into doubt. To convert Holmes' aphorism, the "bad lawyer" would predict not what a court would do but what likelihood he has of being contested in some place that counts.

What of the hypothetical lawyer at the other extreme, not only good but internally obligated, literally bound to the letter of the law? Since, from outside, [illegible] letter of the law is ambiguous, unconscious influences would have maximum influence. Literal interpretation without effort to place "the rule" in the perspective of sources tends to be subjective, particularly in light of the tentativeness, from the outsider's point of view, of fact judgments. But considering how this lawyer looks at it, he has no choice, and that will be the truth of it from outside also.

These extremes bound what must be the range of actual lawyering or even of a particular lawyer's range of law-fact operation. Of course there are many situations where the law and the facts can be stated with confidence, but there are doubtless many situations where the confidence is only subjectively based. Some lawyers surely give moral advice openly, others via an interpretation of law.[48] Even business and other kinds of advice can be given in similar fashion, projected through the authority of law and the expertise of the lawyer as a license of authority. The combination provides a strong rhetoric whether in counseling or mere opinion. In short, in the total range of lawyering lies a possibly great power to use all the norms of society.[49] What lawyers can do is to translate problems out of various social perspectives into the legal medium of exchange. In so doing, they stand as communicants between officials and individuals. One way go the values of individuals and of individual groups, the other way go collective community values and norms. The lawyer acts as

---

the Negligence Jargon: A Plea for Balanced Realism, 18 U. Fla. L. Rev. 369 (1965).

[48] For an interesting example see the situation report and accompanying comments in Freeman, Legal Interviewing and Counseling (1964).

[49] It is not enough to say that the potentials of lawyers' characterizations are conclusions; they are functions of the total decision making situation.

mediator in a way unknown to a court of equity or even a sympathetic jury. Of course they do not communicate this way with respect to all individuals or even with respect to all groups or classes. Maybe, though, we have more reason than we know in a democracy to encourage lawyering in all segments and corners of society.

The potential power of authoritative decision making of the litigating lawyer is probably less in one respect than the power of the preventive lawyer or the lawyer in the unilateral situations. But with respect to courts he has another power.[50] It may be inaccurate to assess his role as merely the humble minister, the carrier of a prayer for relief. It should not be forgotten that it is he, or at least lawyers in tandem, who determines whether to unleash the otherwise inert power of courts. When the case has been initiated, the court is theoretically free to exercise complete power within the limits of the law, but actually the attorneys choose the claims, the issues, and the characterizations. The lawyer in all this may be more quarterback than water boy.

Thus it looms as a possibility that lawyers serve a greater variety of roles than has yet been assessed, partly for the failure to observe the process of law in the dynamics of its use. Lawyers may be a power unto themselves. The power is difficult to assess. The debate in jurisprudence with respect to courts has some relevance here. One worry has been to help law be law and not the mere tool of men, at least in the sense of government action, a government of laws and not of men. Legal realism suggested that courts were mostly men and not law in the traditional sense. Ever since, nervous commentators have been attempting to find controls somewhere, if not in rules, then in policy or cultural restraints. The old notion of stare decisis is gone, and now it is a question of "creative continuity."[51]

But how is it with lawyers? What would be disclosed if we brought to bear a theory of decision on the processes of lawyering? There may be generalizations that can be derived once we leave the simple notion that "law," unanalyzed, determines decisions in light of "facts," also unanalyzed. There may be not only patterns of influences in the positive sense but also discernible restraints, such as conventional morality, public opinion, professional traditions, client demands, and so on.[52] It may still be an interesting question to inquire how "free" a "marketplace" lawyering may be.

---

[50] Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940).

[51] Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1962).

[52] Cowan, *Decision Theory in Law, Science, and Technology*, 17 Rutgers L. Rev. 499 (1963); McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 Natural L.F. 53 (1956); Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 Geo. Wash. L. Rev. 318 (1964).

If there is anything to the thought of this section, that skill in legal rhetoric extends in power beyond the courtroom, the law schools play an unsung role in that extension. It has been the case system combined with socratic dialectic that has given lawyers maximum potential with the permutations of legal and nonlegal vocabularies. Much more is taught than "the law" of this or that area. A socratic technique that bombards with variations in law interpretations, factual statements, rationale characterization, and so on is bound to teach a dialectic process and probably a skill that could not be explained by the student, a skill that need never go to court to be power. A casebook of today without such teaching may be transmitting a different skill, a less creative role. Perhaps a problem approach is necessary to preserve skills that will otherwise subside with the apparent decline of the case system of yore.[53] What the law schools have not yet learned is that legal rhetoric as here described could be taught head-on rather than unnoticed. Yet some might argue that then we would be teaching manipulation and not law: That is a dilemma that must sooner or later be faced. An essential element of law and lawyering no doubt involves a faith of some kind. If not in law, then what? There was too little of faith in legal realism.

IV. H. L. A. HART AND LAWYERING

The Evolution of Analytical Positivism

Jurisprudence is notable for its strikingly various perspectives on law. In the beginning of its rise, sociological theory attempted common law analysis in terms of sociological interests, using mainly the information provided in judicial opinions. Legal realism was somewhat more operational in nature although not scientific in any laboratory sense. Yet in both views some of the aims of science were present, such as clarity and predictability.

As is well known, analytical positivism made an even earlier move to be scientific and to deal with observables or "actualities." Officials and rules and sanctions seemed observable and real. There was an effort to carve out a manageable body of information and derive meaningful propositions. That is also a worthy scientific kind of goal.

But the march of technology, knowledge generally, and culture showed this view to be lacking, both in anthropological and psychological sophistication. A more modern empiricism left this early version of positivism behind. Process became the way to think: structure and change. Frozen structure or hierarchies and a static logic simply did not capture what could be observed and felt. Somewhat different or less authoritarian attitudes probably played beneath the surface of the growing views in the United States, especially in the case of legal realism. Thus, judicial authority was questioned and it was doubted that mere rules could have any authority at all. Meanwhile, democratic aspirations pushed the wheels of the sociological school further toward society and its parts, to a closer observation of what was going on there and to increased effort to carve out an area for study.

---

[53] Cavers, *"Skills" and "Understanding,"* [illegible] J. Legal Ed. [illegible] ([illegible]).

332

Once officials and their procedures and their pronouncements are left behind, a science of law potential seems to fade. There seems to be, in the "what is law" sense, no way to identify "it." One gets involved with social structure, a great variety of norms and attitudes and actions. Analytical positivism had grown out of a reaction to felt chaos in the intuitive and theological and even illusory theories of natural law. In some ways those early natural law views served to reflect to a degree the social dimension. We seem to have come a bit of a circle.

The next move was up to analytical positivism. The move came: Influenced by the new look of English analytical philosophy and reacting to the excesses of legal realism, H. L. A. Hart brought his heirloom into the twentieth century and gave it, too, a new look.[54] Legal realism had in one way carried on in the tradition of good positivism. It was an approach that did not concern itself directly with values because they were not observable or manageable in any scientific approach. Yet legal rules were outlawed, too, and what became more important was the behavior of judges.

But judges without rules were not law. Enter Hart![55] Rules do exist. Not just in law but outside of it, rules are used to control behavior, to justify it, to punish it—in a variety of ways in society. Law involved special kinds of rules. Nor were they self-operating rules or pronouncements only of officials. Again, the very idea and life of law has been rules that somehow control all men, including the officials.

Influenced by English philosophy generally, Hart has seen that jurisprudence as a whole has been plagued, in the same way as philosophy, with misleading questions. It has until recently continued to ask "what is law" and even yet, "what are rules." Even legal realism asked and answered such questions. In keeping with the new mode in English philosophy, Hart would instead ask, how are the words "law" and "rules" used. Such questions are improvements not because the man in the street has been right all along, but because such questions, geared to a special sensitivity to language forms, have a better potential for answers that disclose "what" people are *really* talking about.[56]

---

[54] For a commentary on Hart's general approach and a bibliography of his writings, see Bauman, *Professor Hart and Analytical Jurisprudence*, 16 J. Legal Ed. 379 (1964).

[55] See especially Hart, The Concept of Law (1961). References hereafter are largely to this work, unless otherwise noted.

Hart has used this approach, in a manner befitting his tradition of jurisprudence, somewhat cautiously. He speaks not as critical observer but as alert insider, guided by flashes of light from the outside. In the first innovative flash, he sees that the "outsider" (legal realistic observation, for instance) sees and feels and talks about what is going on differently from the inside participant. He labels the view of legal realism that rules are predictions of judicial behavior as the external viewpoint. From an internal viewpoint, rules of law exist and we are generally bound by them, obligated by them.

The second innovative flash is that the word "rules" is used variously to refer to differing human phenomena. It is only because of the form of the language and because of the common name that we tend to think of rules as being one kind of thing. The different usages of "rule" can be detected by close observation and careful analysis.

He concludes that, generally speaking, there are in a legal system two kinds of rules: primary and secondary. There are primary rules which bind us all with primary obligations and secondary rules that do not oblige but confer powers. Within the latter group are several kinds of rules, including those that confer powers on individuals and those that confer powers on officials. More important than the names and the distinctions is the fact that Hart is actually taking account of the relativity of perspectives in these distinctions.

Hart also deals with another special problem raised by legal realism. That theory seemed to say that law was what judges said it was. According to Hart that is at best only partly true. The word he used to prove the existence of a legal rule is a word currently important in jurisprudence, "validity."[57] Judges play a special role in determining the validity, that is, existence or "lawness," of a legal rule. If judges operate within the powers conferred upon them, then usually their pronouncements are of valid rules which are binding. Judges must operate according to accepted traditions, practices, and procedures. Similar analyses apply to legislatures and administrative bodies, apparently.

---

[56] The main philosophical influence on Hart seems to have been from his Oxford colleagues via Wittgenstein and J. L. Austin (not John Austin). The viewpoint has been dubbed the "ordinary language" approach, an unfortunate misnomer. See generally WARNOCK, ENGLISH PHILOSOPHY SINCE 1900 (1958).

[57] Christie, *The Notion of Validity in Modern Jurisprudence*, 48 MINN. L.

Another important set of rules are those called "rules of recognition." They are pervasive and are the means by which other rules are ultimately determined to be valid. While these rules are not actually known to all individuals, they are potentially knowable. In the meantime, of course, judges have special knowledge of these rules and special expertise in evaluating claimed rules by means of rules of recognition. Apparently included among the rules of recognition is one according validity to the pronouncements of judges when issued in accordance with appropriate process. Of course, other rules of recognition indicate when a statute outranks a court decision, or a constitutional provision outranks them both, and so forth.

Lawyers in the System

Hart does not regard his analysis as complete. Rather he sees it as a framework for further exploration. In that spirit it is our suggestion that our own analysis of the lawyering process places lawyers into Hart's analysis in a way that he has not yet seen and in a way quite consistent with his analysis.

His emphasis is still on the authority of law, the authority both of officials and of rules.[58] But inchoate in his analysis is a view that the authority of law is also invested in persons who are not officials. That comes from his view that certain rules of law confer powers on private individuals. In Hart's perspective, the *balance* of authority of course rests with rules which are complemented by officials.

Put most simply, our analysis has shown that a special authority rests with lawyers. It is an authority closer to that of officials than private individuals. Perhaps that is why in a sense lawyers are sworn into office with a tenure somewhat akin to that of federal judges.

While Hart could not concede that lawyers bind individuals, neither is the authority exercised by judges strictly of that kind. What judges do in this respect is to determine what rules are valid and it is the rules which bind individuals. Lawyers seem to have a similar power. It is true that judges have special insights into rules of recognition which provide the tests of rule validity. It may be that in the sense of breadth of involvement over the totality of law, lawyers have an even greater quantum of such insight and expertise. But in potentiality, Hart seems to say that rules of recognition are accessible to all citizens without the necessity of judicial determination as a

---

REV. 1049 (196[illegible]).

[58] It has been said that Hart is a "liberal" because his chief concern is to preserve private autonomy against government encroachment. SHKLAR, LEGALISM 11-12 (1964), relying on Hart's views expressed in HART, LAW, LIBERTY, AND MORALITY (1963). Many lawyers are involved in that kind of liberality.

prerequisite to rule validity. It is only when there is doubt that judges are needed. When doubt rises to insoluble dispute, then judges may have to resolve such doubt. But lawyers are there first, almost without exception. While lawyers' dispute settlements do not have a stare decisis impact like that of judges, probably their informal process solves more in number, and probably a greater variety of techniques of interpretation are used, as earlier suggested.

There are other kinds of doubt than disputes. Judges ordinarily have no power to resolve doubts short of dispute. Lawyers do. We may call it advising or counseling, but the lawyer's office is usually one of authority in this respect. An individual is not bound, in Hart's sense of obligation, by what the lawyer says. But if the lawyer is correct in his analysis, then the individual is bound whether he feels it or not. More important is the feeling of bindingness and it would seem most likely that many individuals feel bound by the rules which lawyers reveal to them. Even if the feeling is missing the belief is there.

Close followers of Hart may object that he makes it quite clear that it is not the feeling of obligation but the fact of obligation that counts in law. However, thoughtful followers will realize that Hart is referring to the supremacy of valid law over private contrary feelings. In the run of situations, it seems likely that individuals feel bound when they are bound and so notified by appropriate authority, for example by courts and by lawyers, at least by lawyers in nonlitigating unilateral situations. It might be further objected that lawyers are not really the ultimate decision makers because they may be declared wrong by a court or administrative official. But these bodies in turn may be reviewed and reversed. A person does not have to rank at the top of the hierarchy to be an official or to have special powers to determine when laws are valid. Can there be any doubt that in the total hierarchy of authority lawyers have special powers vested by law and acknowledged by individuals?

Citizens do not go to lawyers only in doubt or dispute to determine if they have breached legal obligations. They also go with respect to potential future obligations, as well as to obtain aid in the exercise of powers conferred upon them by law which require the special knowledge that usually only lawyers have. Again, special knowledge may be tantamount to special power. We have earlier analyzed this power in terms of its preventive practice aspects. There may be the acquisition of benefits as well as the avoidance of sanction. Further, there may be involved the working out of a legally sanctioned and lawyer arranged "private ordering," by such means as contracts, for instance.

Also note that our earlier exploration carries the analysis of rule differentiations further along in the direction that Hart has started. He apparently has not yet seen that lawyers may operate otherwise with rules than do either judges or private individuals and that such usage would prove the existence of different rules and powers for lawyers by the very means of analysis which he has used to make his beginning differentiations. Our exploration hardly exhausts the total possibilities even within the lawyering process, let alone in society at large.

Our exploration also carries into an analysis of facts analogous to the analysis of rules. No more than with rules can the nature and significance of facts in the law and the lawyering process be discovered let alone appreciated under the assumption that there is only one level or kind of fact, even though the shift in usages is not readily seen. So we have suggested that this generally neglected dimension, *entirely neglected by Hart*, be pursued into the different areas to fulfill all the better the multidimensional analysis of law processes suitable to this age. Such an analysis can be carried beyond the discussion of law, and lawyers, and facts, into the total legal-fact terminology and beyond. We would avoid, however, the mistake of legal realism in running too fast to see what has been overrun.

The Lawyer and Morality

Analytical positivism does not today ignore the relationship of values to law, but it does minimize them. The current debate is not in terms of values, but still of morality as it was for Austin.[59] For both Austin and Hart, the exclusion of morality from the legal framework is not so much a separation from moral influence or even from general humanitarian pressures in the evolution of law or even in the application of rules of ambiguous purpose. Rather, in this perspective, once law is promulgated validly, it should be strictly applied in accordance with other rules of application. Morality influence should not sway the application of valid rules except to change them *before* application by appropriate procedures. Otherwise law becomes relativistic to the particular case or situation and is no longer law because it is not general in application, nor stable in expectancy; it is thus arbitrary in decision and promulgation. To Hart such pressures seem necessary to preserve law as generally just, that is, to preserve it as law.

Such a premise requires in a decision maker an aloofness from the plea for mercy or for equity, for fair treatment if not in the name of law then in the name of God, and from emotional or psychological involvement in the lives of individuals whose merits lie somehow outside the generalities of a given law or of law generally. If law is to be changed on the spot, it is not to be just for the sake of an individual if there is some reliable promise, by rule, that a general significant class of like cases will be treated in like fashion when occasion arises.[60] But even then, there are guidelines, rules, and procedures for the mechanism of change. For instance, it is in the nature of sanctions such as those of the criminal law that they should not be applied except by virtue of pre-exisiting rule.[61] Certain kinds of legal relationships such as those captured in property and contract rules are so important to the preservation of society that they should not be altered in the judging process, perhaps not even by legislative process, except very slowly to meet the change that society itself has produced outside the legal system. Certain kinds of freedom and expectations that have traditionally been protected within the law, for example by the Bill of Rights, should be preserved most of all against invasion by law. And so on.

---

[59] HART, LAW, LIBERTY, AND MORALITY (1963); HART, THE CONCEPT OF LAW (1961).

True enough, law's structure is dependent upon social values; but then overall values are dependent on the integrity of that structure. The traditions of the rules and of the mechanisms within the structure are what guarantee the structure and the society against chaos, tyranny, arbitrariness, and impetuous or selfish changes that may cumulatively undermine or destroy the structure and at the same time precious individual freedom.[62]

So, in Hart's view, while there are moral obligations, even of a primary kind, very often they are apt to be embedded in law already. Generally speaking, where there is conflict between legal obligation and moral obligation the importance of the legal system to the preservation of society probably gives higher priority to the legal obligation for the sake of society than to the private or small group moral obligation despite the possible loss to the private individual or small group. If the moral obligation wins out against the legal obligation, the legal sanction is justified against the chooser. Of course it may be true for the individual that obedience to law will bring moral sanction upon him. It seems to be in the society's best interest for law to function in this way and for citizens to expect it to function in this way.

---

[60] See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[61] On the observations of this paragraph see generally FULLER, THE MORALITY OF LAW, especially ch. 2 (1964), in which there seems to be much agreement with related views of Hart.

[62] Shklar de-emphasizes what appears to be an authoritative component in analytical positivism generally. See note 58 *supra*. Probably Hart does despair of legal realistic push for general reforms through law, or at least through common law. But even if the role of government through law is limited, in its sphere it is supreme against nongovernmental encroachment. There is a nice notion of balance involved. Lawyers play a highly significant part in the balancing process.

How, then, do legal and moral obligations run with respect to lawyers? If they are merely citizens they should be obligated to law in the same way as any man. Officials are controlled in that way. Yet this assumption can readily be put into doubt as to lawyers. Interesting questions can be raised as to the role of lawyers in the law-morality relationships.

A lawyer is not free to commit murder under the law. That obligation is both legal and moral. Yet he is legally free to aid a murderer to avoid the sanctions of law so long as he acts within the procedures of law. It is possible to argue, of course, that no man is a murderer until adjudged guilty by a jury, but such argument is definitely cloaked in legal perspective. It is doubtful that many outside the profession believe the jury to be the only valid factfinding or value-finding process.[63] Of course, it might be argued further that until jury judgment a man can only be morally guilty and be therefore subject only to moral sanctions. Such argument will sway a few minds, but murder will out in private judgments, even if it does not in court.

It is not that the aiding lawyer himself breaches the obligation not to murder, of course. Yet, no matter how we may rationalize it the lawyer within the legal process, in his role as advocate and champion, is not only free but expected to defend a "guilty" man to the limits of the client's desires within the legal processes. At least, so may it be viewed from the outside.

This champion role seems likely to extend beyond the criminal or other litigational forum to avenues that are not so well lighted. How far should and does the role of lawyer go to aid a client in doing battle with the law itself? The traditions regarding defense of accused persons is easily justified in terms of protecting the innocent as well, putting a burden on the state, and so on. What of corporate crimes? Consider the minor example given earlier, the lawyer's decision not to register a foreign corporation as doing business in the state, to risk the legal sanction instead. Within Holmes' viewpoint on the matter, a citizen or a corporation has that choice. But that is not Hart's view of it. Doubtless there are numerous bits or patterns of "civil disobedience" of much greater magnitude in the business world—and not just in the business world—bolstered by lawyers' opinions or advice.

---

[63] Law school perspectives probably transmit the attitude into the lawyering process that the trial is the ultimate in fairness and accuracy in factfinding. *Cf.* Shklar's comments on the political trial, SHKLAR, LEGALISM 143-51 (1964) and lawyers' ideology at 1-28.

Perhaps a lawyer is not obligated to aid in the enforcement of law unless the particular law is also of moral magnitude. He would himself be an accessory to advise a murder or a robbery or embezzlement on the ground that the risk of legal sanction might actually be slight.[64] How about aiding or abetting a monopoly or actions in restraint of trade?[65] What does it mean when a lawyer takes an oath to uphold the law? In this period, it seems likely that a lawyer who advised a trespass in aid of Negro moral rights, in the process of publicizing the Negroes' plight to aid ultimate legal change, would be performing a desirable role not only in that advice but then in bending every rule to protect his clients from legal sanction.[66]

There probably is a difference of some sort in advising a client to breach a contract and pay the penalty or even to utter a libel on the one hand and on the other advising a breach of criminal statute which is in breach of morality of the entire community at all class levels.[67] To aid in civil rights movements is to pit one morality against another. Criminal laws, generally, involve class coercions, one class against another; not always, but very often. Lawyers ought to be free within the law to promote changes. Would that extend to promoting a sex morality of one class against the law which promotes middle class sex morality?[68] Surely upper class persons find protection against such laws. And compare the laws regarding divorce. Here we may camouflage the law-moralities conflicts by reverting to legal realism and saying that the law on the books is not the law.[69] In a way that is a fiction which is not consistently applied. We do not say that it is legal to murder even though murders go unpunished at times.

---

[64] Note, *Advising a Client as to a Future or Continuing Crime*, 18 WYO. L.J. 65 (1963).

[65] STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 443-47 (1966), discussing the difficulty of proving violations of antitrust laws and the inadequacy of sanctions weighted against the profit motive. See also LEVY, CORPORATE LAWYER, SAINT OR SINNER (1961); Paul, *Restatement of the Law of Tax Avoidance*, in STUDIES IN FEDERAL TAXATION 9-157 (1937).

[66] Here one morality meets another. Lawyers in the South, and very possibly elsewhere, who attempt to uphold "the law of the land" run the risk of the destructive sanctions of local power figures if not of the community generally. Pollitt, *Counsel for the Unpopular Cause: The Hazard of Being Undone*, 43 N.C.L. REV. 9 (1964). On lawyer duty to push civil rights, see Tinnelly, *The Lawyer and Civil Rights*, 10 CATHOLIC LAW. 24 (1964).

[67] CARLIN, LAWYERS' ETHICS (1966) deals with the text kind of problem to some extent. While he makes a distinction between the internal norms of the profession and community norms generally, he fails to maintain the difficult distinction.

[68] FREEMAN, LEGAL INTERVIEWING AND COUNSELING 126-32 (1964) presents the report of a lawyer on his handling of two statutory rape cases. See especially Professor Weyrauch's comments on the clash of moralities at 131-32.

[69] See the general findings on the conflict of law and practices in this area,

Lawyers probably come under law-morality binds such as tempt no other class of individual.[70] What is a lawyer to do when pressured by client demands to promote ends or means that are questionable in light of the letter or spirit of discernible rules, whether judicial, legislative, or administrative?[71] He can find most convenient rationales in legal realism, but that is one reason so many do not like legal realism. It considerably weakens the authority even of clear law.[72]

What we may be coming to in this analysis is the suggestion that no matter what law or legal system is in the Hartian sense, and even if we did agree that the lawyer is part of that legal system in a significant way, when we come to the consideration of morality and values he is not just a lawyer, he is a valuer.[73] He is part of two systems, the legal system and the value system. That fits our earlier statement that lawyers are communicants between law and individuals. He represents them both at once. Such is his obligation and his role. He takes special risks and perhaps therefore should receive special immunities when acting as lawyer-valuer. When the Canons of Ethics say, "Do not become involved, lawyer, in a conflict of interests," they do not truly embrace such matters. Of course a lawyer's overall ethical profile is hardly limited to influence from the Canons.[74]

These are matters that might be probed much further. They raise serious questions for legal education. If lawyers become involved in law-morality conflict, they should be prepared fully to handle them

---

O'GORMAN, LAWYERS AND MATRIMONIAL CASES (1963).

[70] For comment in the tax practice area, see Cahn, *Ethical Problems of Tax Practitioners*, reprinted in CONFRONTING INJUSTICE 259 (L. Cahn ed. 1966); Paul, *The Responsibilities of the Tax Adviser*, U. SO. CAL. 1950 TAX INST. 1.

[71] Or "ethical." Carlin finds that the ethics of the lawyers he questioned in New York City are shaped, *inter alia*, by the pressures of clients, which is no surprise. CARLIN, LAWYERS' ETHICS ch. 4 (1966).

[72] *Cf.* the comments in notes 58, 62 *supra*. A lawyer who is a legal realist, or perhaps an unconscious manipulator of legal rules, may be quite free to let prevalent or even private moral pressures come through his legal interpretations. See the analysis under "Dissolving the Acid of Legal Realism," text accompanying notes 42-46 *supra*.

[73] *Cf.* an impact of a functional analysis of lawyers with respect to their policy and social value significance. See authorities cited notes 26, 27 *supra*; Krastin, *The Lawyer in Society—A Value Analysis*, 8 W. RES. L. REV. 409 (1957); McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 NATURAL L.F. 53 (1956), who sees lawyers as having significant policy influence, if nothing else, as advisers to top policy shapers; E. BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE (1948).

[74] CARLIN, LAWYERS' ETHICS (1966). This work opens the door to the kind of inquiry we suggest, but we still need something closer to participant-observation.

and to know how such matters are worked out in the course of lawyering. They should become aware of the known and the debatable obligations. A law school cannot do its job well and be just a law school in the Hartian perspective or in the related positivistic perspective that ranks so high in the United States legal educational profile.[75] This is not to say that these perspectives do not contain a high level of moral attitude, at least to the exent that law itself reinforces morality.[76] Positivism's fear of legal realism may partly have been that it was carrying positivism too far, to the point that lawyers might be amoral in disobedience to the morality embedded in law itself. But to the extent that law is middle class morality, and not overall morality, the camouflage of values that lies in typical positivistic analysis in the United States is to some extent, then, amoral—not fully conscious of morals and values.

There will be resistance to all levels if the argument for teaching morality as well as law in law school is left at this level. For one thing, it will be said that such education is preaching and impractical. But the suggestion here is that the practicality can be proved in the very process of uncovering the conflicts, by dealing with the kind of problems that lawyers face. The attempt in such process should not be just to prove what law is in the traditional sense, not just to teach students how to deal with legal problems from the old perspective, but to gain a new perspective on the social problems faced and handled by lawyers—as well as those not faced. The inquiry cannot be made by persons who close their eyes or see with stereotyped impressions. The problems and the viewpoints must be seen as they exist. That, of course, was the legal realists' desire too: not to be amoral, but to find out how to be really moral. A resistance to the effort of such discovery might partly reflect a fear of discovery rather than merely moral concern. But open minds can grapple with such problems, having learned from past mistakes. All of learning comes to that, leaping over the mistakes made in the process of discovering and pursuing truth—and values.

---

[75] *Cf.* Lasswell & McDougal, *Legal Education and Public Policy*, 52 YALE L.J. 203 (1943), going much further in analysis than the term morality, certainly further than Hart or Fuller want to go, probably further than most persons in the profession are willing to go even today. See also STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY (1959). The pressures for moving much beyond positivism in law school education are mounting, as was evident at the Conference at Greystone Lodge, note 1 *supra*. Yet one cannot simply reach into the profession and change its values. Realism seems to call first for speculation on those values—and we have a lot of that—then for an attempt to confirm speculative hypotheses. Short of revolution, such steps are necessary antecedents to reform efforts.

[76] "[E]qually the separation doctrine [of law and morality] is held by thinkers who have a keen sense of responsibility and great moral earnestness." STONE, HUMAN LAW AND HUMAN JUSTICE [illegible] (1965).

V. CONCLUSION

Despite all we have said, it will not seem fitting to many to think of law in terms of lawyers' activities. Of course old commitments cannot be easily relocated. Yet we would regret losing our way for the lack of suitable definitions. Essentially our theme calls simply for a clear-eyed look at lawyering as a specially significant process of human interplay relating official decisions and private activities to each other. Sociological jurisprudence and legal realism lead readily in this direction as one of several relevant pathways. Analytical positivism and natural law approaches tend to ignore what are regarded as mere implementations of controlling norms, either official or transcendent. Of course all these approaches are grounded in varying ideologies. As we see it, any ideology remains footless without a communicative nexus to the society from which it stems. In the end, a legal theory must make sense to those who work with the stuff of law. Maybe there will be some who will believe with us that it is now politic to attempt at least some minor span across one of the valleys of misunderstanding.

CONNECTICUT
LAW REVIEW

VOLUME 1 DECEMBER 1968 NUMBER 2

HUMANISTIC LAW THROUGH LEGAL EDUCATION

*Robert S. Redmount**

PATTERNS of personal experience assign to law the nature and extent of its humanistic qualities. These patterns derive from human interaction in which law may be or is a subject. Law is pragmatic to the individual and therein lies much of its value and its meaning in human terms. It may be "in touch" with human experience and thereby more likely serve humanistic ends, or it may be "out of touch" and foment various forms of negative reaction.

On sight, there is little news value in such general propositions. However, the places where one chooses to find law as a subject in human interaction, and the peculiar patterns of interaction that attend law in these various places, are of some new importance. Traditionally, one searches for the human meanings and characteristics of law in relation to trial experience. However, if this becomes the limit of the search it is as if the true tests of law are in its official and recorded workings, and related personal meanings and experience are but literary comment on this process. "Real law" then exists only in institutional terms, where a matter such as divorce comes within the province and the standards of litigation, and not in personal terms where it comes under less certain practices and experiences in attorney-client relations. The proper implementation of predictable standards and procedures is important, and related practices and effects in personal behavior are not customarily regarded as an essential part of the legal context. For example, tax work in the legal sense is statutory construction in the anticipation or avoidance of litigation. In its "non legal" aspect it is an attorney communicating with a client about the client's problems, needs, and desires where tax law may impinge. The distinction between "legal" and "non legal" or "*real* law" and "something else" defines law in ways that give it, or fail to give it, meaningful or acceptable human value.

---

* Of the Connecticut Bar.

The point is better put if we regard human experience with law in the formal legal learning process involving law student and law teacher. In [a later] issue of this review the thesis of humanistic law through legal processes will be further developed through an examination of the legal counseling process.

LEGAL EDUCATION

It is law, the subject, that occasions the interaction between the law student and the law teacher. In this interaction framework, law is essentially what the law teacher is able and chooses to teach, and it is what the law student needs, chooses, and is able to learn. The law teacher regards law in terms that reflect his own position in an institutional universe dominated by an inexorable sense of particular values, a fairly fixed method of inquiry and a highly traditional technology. It is an institution that has largely formed his own beliefs and skills. In the best sense of the arrangement he is a professor and skilled advocate; in the poorest sense, he is too much of a brain-washed agent. The law student, on the other hand, is a bundle of spontaneous awareness and beliefs grounded in the framework of his stage and place in life but he mostly lacks professional direction and intellectual discipline. His expectations regarding law are close to the psychology of his experience and therefore highly fused with emotional and moral dispositions.

The Status of Facts in Law

The morphological characteristics of legal education are of considerable importance. They are an essential part of the interaction between the law teacher and the law student. Typically, the first concern is with the awareness of experience, or with what is somewhat facilely called the "facts of the case." "Facts" in legal education are prefatory and this implies secondary importance in teaching and learning. They are in the nature of an account that serves and sustains some subsequent inquiry. It is the means and end of the subsequent inquiry that is the web of law learning.

Facts in this context are not, and perhaps are not intended to be, fully accurate or complete information about experience. They are approximations tailored in their essentials to meet the needs of brevity, simplicity, and clarity. They are the observable or stipulated details of, for instance, a decedent's intent to execute a will which becomes a subject of litigation because of a legal question about proper or effective execution. They do not concern themselves with the attitudes, the uncertainties, and the conflicts that lay heavily in the thoughts and feelings of the decedent as he shaped the details in the first instance. Nor do they much concern the behavioral effects of the decedent's success or failure in executing his decision. In short, they are not much concerned with human consequences, except perhaps as these might relate to a matter of "justice" as this is adjudged from the tailored presentation of experience.

There is an unquestioned convenience in such a view of facts, especially in a pedagogical context that is principally concerned to teach about other matters. Facts act as constructs. They have qualities of plasticity unlike that in a real world where they tend to follow or to be a part of relatively orderly patterns of experience. Their intent and character can be freely interpreted as if they are a part of any or no system. They are only crude in dimensions and characteristics so that they can be stretched or narrowed to fit logical or legal propositions. The plasticity freely given in law teaching may seem abhorrent until we consider that it is such a view of fact as a determinate variable that enables the traditional system of analytical inquiry into law to establish the determinacy of law. Complication and proliferation of fact renders confusion in law. This is notably so where law is a closed system concerned only with legal and ethical "truths" mostly logically derived from a preexisting framework of propositions that are fictionally regarded as constant.

It is in humanistic terms that there is the greatest lack or loss as a consequence of the kind of intelligence about facts shared by the law teacher and the law student in law learning. The student's more natural and untutored sensitivities to facts and to the psychology of experience are blunted rather than developed. His regard for such matters as the human consequences of law may be deemed irrelevant unless it fits the narrower institutional framework of rights and wrongs as determined by law and equity. Least and worst of all, perhaps, he learns and develops no framework, method, or skills in fact inquiry. He must rely mostly on logical interpolations from direct observation or account with little or no intuitive or psychological skill. His judgments are impressionistic and are not carefully grounded in any reliable interpretive framework for human behavior. A narrow, undeveloped view of fact problems and a disposition to be preclusive about fact situation tends to be encouraged. The law teacher, as a product of the system, generally has nothing further or better to offer the student regarding the determination and the importance of a meaningful and thorough fact inquiry. In truth, since his strength and contribution lies in other kinds of inquiry, he may view a more intent concern with facts as a matter of some threat or irrelevance.

It is the interpretation of experience, more than awareness, that engages the law teacher. In the realm of fact inquiry this means that he is mostly concerned with definition and standards for facts. Implicit are premises that suggest that facts are unruly and the framework within which they fit or operate is either excessively attenuated or lacking in definition or system. Facts from differing contexts and having differing importance and differing degrees of validity tend to be equated and lumped together. The task of law in the teaching of fact investigation is regarded as a matter of defining general standards to prevent misinterpretation of meaning rather than to aid in the interpretation of meaning. Psychologically, the process tends to whittle away at experience. It restricts the range of acceptable observation and inquiry and, at the same time, orders judgment in terms of specific and isolated phenomena rather than in terms of continuous and meaningful experience.

Fact disputation, as distinguished from fact inquiry, is the stimulus for legal and pedogogical concern. Conflict, disagreement and uncertainty act as a pressure for succinct definition and decisive judgment around which the legal view and concern with facts is built. This narrowing process is felicitously served by traditional logical modes of investigation that are also historically concerned with the systematic classification more than with the character of experience.

Rational Inquiry in Law

The large mainstream of legal education concerns itself with the proper and effective interpretation of statements of decision by institutions of legal authority. Skills in classification and in making logical inferences are developed from Socratic inquiry into the arrangement of language, primarily. The validity of interpretation is based upon the plausibility of relationships between present and past statements of decision. This is determined by taking into consideration the hierarchical position of the institution of legal authority rendering the statement of decision, whether the statement is declarative or supportive, and whether the decision is a majority or minority decision. A process of interpolation is used to relate the law governing one *account* of factual experience to the law relating to another *account* of a different but possibly parallel factual experience. The same process is also used to select and advocate the law governing one *account* of factual experience as distinguished from law selection and advocacy to be used in a different and varying *account* of the same experience.

Holmes' proposition that "the life of the law is experience" is counterpoint and expresses an attractive wish but Coke is correct in his statement that "logic is the life of the law." At least, legal education tends to verify this observation. A stout intellectual discipline is developed and maintained in law training not only to interpret law but also to interpret human experience. The skillful use of thought and language is the outcome of such learning. Disciplined but also imaginative use and application of logic is a result. Since law is a loose amalgam of statements of decision by legal authority, the lawyer learns to operate effectively within this framework and to exercise intellectual moves that vitalize and protect legal boundaries in social experience.

Law learning at its present best is a vigorous intellectual experience. The contribution to values and perspectives relating to life, an inevitable effect, is quite another matter. Because the interpretation of law is a consequential interpretation of what is meaningful and important in life, law learning must be regarded as a kind of experience and direction in humanism. The law student, lawyer-to-be is so saturated with the exercise of intellectual power under the magistracy of legal authority that he almost unknowingly develops an arrogance toward human beings and about the interpretation of life experience. He develops an aura of certainty in the use and power of his professional and personal skills that fortifies self-confidence and commands respect. It at the same time renders him more or less rigid and unperceptive, and intolerant to other approaches to and interpretations of experience. He is able to develop strong conviction but he unknowingly lacks sensitivity. The struggle to develop a consistency of interpretation, so important in legal education, is a struggle to develop conformity. Implicit is an antipathy to change. Important references to human conduct are in the light of tradition and, especially, traditional interpretation and acceptance. The need for continuity in the interpretation of experience for the most part subtly discourages a more enterprising view of life experience based on possibility rather than permissibility. The values thus engendered are important but they tend to provide and encourage a one-sided and essentially restrictive view of experience.

The law teacher-law student interaction, by the endemic character of legal education, is mostly in the nature of a vigorous intellectual assault. Initially, it is an assault by the agency of the law teacher upon the student's emotional and moral sensitivities. The student's reaction is likely to be one of hurt, resentment and bewilderment. However, survival demands the suppression of feeling, and identification with the aggressive masticating process. In time, and with the aura that power and authority is given in law anyhow, the student learns to identify with and even to admire the law teacher who is overpowering. They are arm-in-arm combatants and a strong sense of fraternity develops. There are later divisions and mutations of loyalty that witness strong, insular fraternal bonds among practicing attorneys, among judges, and among law teachers.

To many, this law learning experience and the human interaction that is involved is initially and not infrequently ultimately disillusioning. In particular, it is the absence of respect for the sensitivity in human experience that offends. Assaultiveness, even under the guise of intellectual inquiry and where there is no counterbalance in learning experience, becomes a demeaning human experience. It may be demeaning even in the name of the human spirit and human sensitivity. For the successful law student who continues his professional interest in law, pride is engendered in the skills he develops, in his identification with a powerful and prestigious social institution, and in the social importance of his work. He is unaware of any lack or loss of sensitivity to human experience. He can properly regard that he is dealing with important dimensions of human experience and he may feel that he is dealing with the essence or the whole of it.

The Nature of Scientific Inquiry

In terms of learning experience, science as a form and means of investigation contrasts with the spirit and character of legal inquiry. The differences have important implications in the regard each has for experience and in the attitudes each tends to cultivate.

The concern of science is to inquire into the facts, conditions, and consequences of experience in terms of some sphere of regular interaction or interdependence. The "sphere of regular interaction or interdependence" is in effect a set of speculative or derivative rules that account for the behavior under inquiry. The student of science is regularly exposed to experimental frameworks of inquiry that serve to impress upon him the variable characteristics and behavior of a segment of experience put under scrutiny. A mediating doubt and skepticism rather than certainty or indifference is the attitude engendered toward facts. Implicitly, there is a concern for greater rigor in fact determination. Facts are set in the context of a theory or a rule of law. A spirit of competition is encouraged to test empirically the relationship between facts and their theories and between one theory or set of theories and another. One detects the same kind of vigorous intellectual assault that one perceives in law training but facts grounded in empirical investigation are not subordinated.

The view of theories or rules in science education is also somewhat different from their regard in legal education. There is almost a zealous spirit in attacking theory to determine its strength and validity in terms of experience. Should theory not accord with the facts that purport to attend it, so that the explanatory or predictive value of the theory fails, one perhaps more readily searches for new theory rather than for a readjustment or reinterpretation of the facts. Though there are spectacular exceptions, most theories are not such important constants or seeming causal agents in relation to experience but that they can be readily displaced or abandoned. Scientifically derived rules are not accorded the same degree of respect or reverence in most instances, or the same assumption of validity, as are the legal rules of society. This institutionalized view of rules in science education acts psychologically upon the student. It encourages him to regard most experience in terms of fixed equations with disfavor and it promotes a more receptive view toward change. Conversely, a somewhat intolerant attitude toward constancy and tradition may develop along with a cavalier assumption about the ease with which change may be generated.

Findings based on scientific inquiry, as distinguished from the methods of such inquiry, provide an intellectual paradox. The struggle to render empirically-derived knowledge on the same footing as the knowledge developed mostly from assumption and reason is slowly evolving into a general disposition to favor the validity and worth of the empirical. At the same time, the skeptical approach to facts and the fluidity of theory in scientific inquiry in a universe of constant new findings tends to render much scientific knowledge conditional. There may be vast differences in the validity and consistency of knowledge within a highly developed system of theory well-substantiated in the interactions and interdependencies of facts, and primitive theory in relation to which only small constellations of facts have been developed and tested. Differences may be expressed in terms of probability regarding the relatedness of theory and fact to the explanation or prediction of experience. The rewards of science derive from new or more certain findings. The psychological bias of the empirical inquirer is to exaggerate claims of validity especially for recent facts and theories in his sphere of inquiry. He does this by tending to stress a greater or more consistent relationship between given fact-theory and a range of experience than truly exists. He also does this by tending to neglect or minimize possibilities for findings and explanations that either have not yet occurred to him or that are beyond his favorite frame of inquiry.

The Nature of Psychological Inquiry

In brief, the essential thrust of legal inquiry concerns itself with the exercise of governing rules. That of general scientific inquiry focuses upon the analysis of cause and effect in experience. In much clinical psychological, psychiatric and psychoanalytical inquiry, it is the stress on the assignment of meaning of behavior that is perhaps most important.

Psychological analysis views emotion as a prime means for the expression and interpretation of experience. Emotion operates in terms of a systematic albeit nonlogical framework of behavior that is increasingly being made articulate. It reveals itself in symbolic as well as rational conduct. This provides a magnified view of experience with an emphasis on the awareness and meaning of non-rational behavior and on the complex character of observed and rational conduct. The design of behavior goes beyond simple nominal dimensions and is traceable through some layers of intent and motive ranging from the obvious to the obscure. Both appearance and awareness are recognized to be a matter of complex mental and emotional sets. In this psychological framework, intuitive and apperceptive skills can be as revealing or more revealing in gauging behavior than such familiar eductive processes as inference and analogy. Intuitive, apperceptive, and interpretive skills are developed in psychology students mostly through the use of the participant-observer medium in close, relatively informal interaction with other human beings. Realism may be engendered if a personal problem or a decisional focus serves as the motivational basis for the interaction. Instruction consists of guided awareness and interpretation of the use of language and other expressive behavior in the two-person or small group situation. This serves to encourage further communication and ultimately fosters better comprehension and perhaps a wider choice of solution for the matters at hand. Clearly, instruction is most effective when it is rendered by a person who is tutored in the explanatory frameworks of psychology and knows how to "read" behavior.

Since emotion is typically regarded as exceptional and unruly in the traditional views of behavior it is considered with disfavor in rational conceptions of experience, and tends to be avoided. Psychological explanation appears as unnecessary complication to be avoided. Further, the lack of familiar guideposts in the interpretation of behavior reinforces a feeling of doubtful credibility.

Psychological constructions of behavior are blends of intuitive observations and sophisticated speculation that are difficult to assess by conventional evidentiary tests. The role of intuition and the substantial need for derivation to arrive at meaning and interpretation makes an atomistic or simplistic analysis of behavior in brief empirical or rational terms irrelevant and inappropriate. Facts are difficult to assess appropriately if they are isolated from the motivational framework that attends them. And, motive cannot properly be reduced to a few simple rules of implication. The consistency of configurational patterns of observation and interpretation in terms that succinctly point to the explanation or prediction of behavior is the most appropriate means of validation. Reference to rules of external conduct provides a lesser insight and basis for judgment in determining the validity of behavior for the individual than evidence of consistency of operation. Truth here is mostly a judgment expressed in terms of probabilities. Categorical determinations of fact freely or forcibly given are an exercise in presumption or in expediency.

The large area of mutual distrust in explanation and findings about behavior shared by the practitioners of law and psychology can be observed in terms of some interesting parallels. In law, behavior is a composition of direct observation fortified by fictions and presumptions and cemented by means of logical systematization. The norm is conformity to an external standard. In psychology, behavior is a composition of direct observation crystallized in terms of intuition and apperception and explained mostly in terms of the systematization of emotion. The norm tends to be internal consistency of operation. The competition in speculative methods, and in constructs and conventions, is more striking perhaps than the indications in either of determinable truths.

Psychologists, like other beleaguered advocates, tend to claim too much for their methods and findings, even to the point of arrogance. The frame of reference for the analysis of behavior is essentially narrow. The operation of emotion is far better understood and systematized in psychological terms, and even to some degree in physiological terms, than in terms of the impact of social processes and social value systems that also govern and explain conduct. A remarkable degree of obscurantism occurs but it probably has some functional value and justification in safeguarding tentative knowledge from intemperate and excessive criticism. Rationalists, including the law community, are exceedingly distrustful and skeptical, and at times intemperate. In large part, this reflects the disappointment and defensiveness that attaches to a lack of substantial skill and knowledge in explaining behavior, and to the lack of an effective critical framework. Where there is a measure of trust or acceptance, there tends to be reification rather than understanding, and a similar lack of critical skills exists.

Current Legal Education and Problems of Change

The legal interaction with human experience and as a part of that experience has important political, economic, moral, and social derivations. It is a part of the fabric of social history. The subject is more than a book-length matter. Our continuing social experience today has increased in complexity. Our awareness of personal and social experience has become more complicated. The legal ministry has become increasingly specialized in a society where specialization is the trend. Perhaps these are the current events that address themselves to legal education, in its role as mother to lawyer and then to law, as important influences in current legal interaction with human experience.

In legal education today a cohering framework and system of rules and reason is taught in which the data of experience are subordinate in emphasis. The method of teaching is in the nature of vigorous intellectual exercise in which the contention of syllogistic logic is the primary mode. A problem exists in finding an appropriate means and emphasis by which to incorporate the powerful development of empirical and especially experimental science with its focus on the phenomena of experience, and to incorporate the significant modes for the extension and interpretation of experience through psychology. Many legal scholars and practitioners have not been insensitive to the need to develop law training in this direction. Many note, too, that continuing social change and the lack of good attunement to personal and social experience jeopardize law's standing and competence to deal effectively with social and personal problems. The problem has been how to bring about essential change without doing harm to essential emphases and elements in law learning that are the very cloth of an important intellectual discipline and basic social control. The development of totally new methodology and technology is an unrealistic risk. (It may be more brutal than fractious to add that this also invites wholesale unemployment and this alone is enough to create myopic views of change among legal educators and lawyers.) On the other hand, more tepid and fearful efforts to bring about desirable change are in the nature of tokenism and generally prove to be inconsequential.

Problems of attitude as well as questions of intrinsic value have much to do with the success or failure of efforts to modify legal education. The general disposition is to view with alarm or disinterest any new approach that might entertain a shift in emphasis away from inquiry into the vesting of rules and support of rationalistic methods. The view that reality experience is expedient in the fact-law relationship (see section on "The Status of Facts in Law," above) tends to insulate legal education against any serious regard for newer methods and substance for law based upon closer analysis of and concern with external realities.

Much innovative effort tends to be suspect because of its essentially hostile intent and uncompromisingly negative attitude toward the intellectual structure of law. This is especially true of efforts to convert law into an empirical science, first clearly identified in some of the proposals of "legal realism" more than a generation ago. Subtler forms of attack may be evidenced under the guise of valid inquiry into legal processes by psychiatry, sociology, and other behavioral and social sciences. The hostile dispositions come from within law by those law scholars and practitioners who are essentially disillusioned by it, and from outside of law by those professions which seek a base for extending their own range of influence.

Disappointment has occurred, too, where expectations have not been realized. Advocates are not disposed to see the limitations of their efforts and emphasis. In some instances, the premature advancement of scientific method or psychology as a substantial substitution for methods and findings in law has only served to reveal the primitive state or the inadequacies for legal purposes of the newer approach. Changing over fact and procedure from one institutional framework to another wrenches the theoretical processes and carefully worked out applications within both. A careful and sophisticated translation and possible further development of methods and data must occur if newer methods and findings adapted from one institution to another are not to be too gross or too narrow, or inappropriate in other ways. The tendencies to merely append foreign methods and findings to law, and to inquire about legal processes in terms that fail to recognize or understand intrinsic values and operations, are also sources of disappointment. Appendages to law may not contain enough essence of legal experience and are of relative unimportance. Inquiry about law is not the same as inquiry into law. Investigation by scholars and scientists who are not legally trained or who are disposed to negate legal operation frequently is of relatively little probative value in the long run and may have little relevance. It fails to come to grips with the kinds of problems that lawyers and law scholars must face within the context of the legal institution and its operations.

Problems of human interaction, based on differences in professional and intellectual identifications, also tend to impede and interfere with prospects for significant change in legal education. Lawyers and law teachers are zealous of their institutional power position and their tradition in society. They tend to view with distrust usurpers who would displace or negate them under the guise of social or intellectual improvement. An uncompromisingly skeptical view, with fear, doubt, anger, and distrust toward outsiders, is not uncharacteristic. On the other hand, for those in law who are more strongly impressed by the limitations or inadequacies of their profession, an excessive susceptibility and gullibility may develop. They may tend to be receptive to new approaches and wholesale substitutions of ideas without sufficient critical regard for their possibly limited probative value or application. On a psychological level the attitude is manifest in the form of their becoming virtual non-lawyers or legal scholars and becoming instead an amateur something else. They may regard other professionals and those of other intellectual disciplines with whom they tend to identify with excessive awe. Their own worth is deprecated.

The representatives of professional and intellectual disciplines who might interact with the community of legal education are also zealous advocates for their own fields. Characteristically, they are untutored in law, its traditions and its problems as these are seen from within the legal institution and they therefore or nonetheless have little regard for the intellectual and professional traditions of law. They tend to have a missionary view of their function in interacting with legal education. This posture implies contribution and correctness for their viewpoint and it tends to stir up defensiveness in legal educators.

With these dispositions, the interactions of legal educators and those of other disciplines is essentially guarded with a ripe potential for active hostility. As a first stage in development that sometimes proceeds no further, polite interaction is made secure by inviting "outside" participation on a sharing basis in a sharply delimited area of legal interest. To insure against overt conflict over the perception and understanding of issues, a retreat behind one's professional identification and resort to obscure jargon is frequently tacitly permitted. This helps to draw the line on a troubling issue, saves embarrassment, and may imply that somehow further crystallization lies within the "other" field. An appearance of interaction may also be effected where outside disciplines are given small, peripheral roles in legal education. They can operate comfortably and independently in these roles according to their own traditions without really becoming involved in the problems, issues, and needs of law training. Law students receive an "exposure" to the operations of other fields that tends to reinforce a feeling of esoterica in these fields with ultimately limited relevance to their "real" law interests. Alternatively, they sometimes become much attracted to the other fields and decide to learn and apprentice elsewhere than in law. Some legal scholars, working independently or in concert with representatives of other disciplines, have undertaken to apply the methods of other disciplines to legal problems within the framework of research projects. Systematic inquiry of this nature generally has not been continuing and has filtered very little into legal education. This may reflect that the research undertaking is a narrow and/or personal interest and operates from a narrow base of inquiry that has hardly affected basic patterns of institutional thinking about legal education.

The most successful efforts at interaction between legal educators and those of other disciplines have occurred where a close, informal relationship has developed between scholars. The fraternal-like attachment becomes the basis for mutual exploration of ideas and dissemination. The result is characteristically a joint effort in teaching or scholarship relating to a generally narrow range of inquiry and mutual interest. Basic institutional patterns of thinking in legal education are not likely to be affected unless there is a general curiosity about and receptivity to various law-related propositions from another discipline that are attractively and congenially presented. The idea of two or more disciplines within one skull, somehow integrating the best of both and translating the result to useful legal skill and knowledge, has seemed to have attraction and possibility. The risk, and frequently the likelihood, is that personal or professional requirements incline the variously trained person toward a single-minded, one-sided discipline and a single professional identification. There may be a strong tendency to reject rather than to integrate important spheres of influence, skills, and knowledge that are, potentially, the substance of exceptional contribution. As a consequence, a true exercise of issues through diverse and at times difficult conception and communication frequently will not occur.

Toward a Law University

The essential configuration of law in its most familiar and traditional terms is: (1) a value emphasis on order and rectitude as both means and end in conduct; (2) a theoretical-deductive framework of analysis heavily invested with ethical constructs of duty, right, privilege, and the like; (3) an assumptive system regarding facts as fixed elements of experience subject to logical construction within a system of mechanical linkage; and (4) a technological system of investigation and decision, based on reason and convention, to make regulation and sanction viable. This total institutional framework is a coherent, viable, and practiced system with an integral character and consistency. It can operate with reasonable effectiveness where there is a unitary composition of experience based upon: (a) a single value emphasis; (b) a vested structure of authority; (c) an adjudicative and a largely declarative function reinforced with sanctioning power; and (d) a regard for facts as having static properties. These basic requirements are met most notably in the institution of the courts and in the traditions of adversary proceeding and advocacy around which most legal education and much legal practice is built. In so far as this is a major denomination of the legal institution and serves a strong proprietary interest both for law and for society, the scope of fault-finding should be narrowed. The integrity of the system and even its effectiveness has much to recommend it. This is true as long as one gauges its value only in terms of the unitary purposes and traditions it serves or is designed to serve best.

Where law subscribes to a variety of social interests, the properties and the configuration of law, legal practice, and desirable legal education are perhaps different. In a context of various social structures and social process, and various kinds of human experience, law is a phenomenon of experience whose approximately exact place and relevance is more or less systematically determined through something like a process of mathematical-inductive inquiry, as with other phenomena. The inquiry is geared to an exploratory framework of theory whose validity is mostly determined by its ability to explain and predict experience in pragmatic terms. Law is part of a diversity, rather than a unity, in which differing purposes and values may be served depending upon context. The method of investigation is premised on principles of dynamic relationships within configurations of experience rather than upon mechanical linkage of events. Empirical investigation supported by scientific constructs is used to ascertain meaning and truth. Law is a fact variable whose precise characteristics and influences are sensed and adduced, and whose relationships to other experience are expressed in terms of behavior probability.

In this focus, the primary emphasis in law is on its character and operation as an integral system of inquiry into experience or as part of such a system. This is quite distinct from an emphasis on law as a system of authoritative decision in which inquiry is subordinate. Law's system of inquiry is succinct and made meaningful when it is in some way structured and oriented so that experience is seen in the light of law's potential and actual systems of authority. At the same time, such a system of inquiry should permit the construction and handling of experience so that decisions may be expressed, and sometimes preferably expressed, in possibilities other than the exercise of legal authority. In this way law as a system of inquiry and as a system of authority can be or may need to be ultimately related.

The focus on law as a system of inquiry into experience is not a novel or foreign use or attribution of law. Some may claim that one of the strengths of legal education is that it is preparation for such inquiry. However, it is at least doubted that legal practice and legal education serve such a purpose well. Legal education does not serve the lawyer who is consulted on a variety of personal, social, and institutional problems nearly as well as it serves the lawyer who is appointed to operate the traditional mechanisms of authority of law. The need is for excellence in delving into and ordering the properties of experience, as well as excellence in defining and advocating some of the properties of authority that guide end results.

A true university of law can and should encompass diverse emphases, systems, and methods without slighting or subordinating important principles and requirements of learning. The ubiquitous character of law in human experience provides substantial bases for this. One of the large problems is to determine the substance and organization of a learning program so that strong and discrete disciplines within law emerge to compete for student interest, develop sensitivities, and vary the perspectives, understanding, and skill the student acquires.

Empirical Inquiry and Clinical Training in Legal Education

Law's relation to social experience is likely to be most significant in four spheres of inquiry. These concern: (1) the problem of proof within methods of legal authority; (2) matters of economic organization and control; (3) matters of political organization and control; and (4) problems of individual and social behavior and influence. The problem of proof within methods of legal authority is a concern for validity and value in the observation, interpretation, recall, and report of experience. The matter of economic organization and control focuses upon possibilities, operations, and effects in various arrangements in economic enterprise. The matter of political organization and control is concerned with design, operation, and impact in the exercise of governmental authority. The area of individual and social behavior and influence is concerned with the range of effects of patterns of potential and actual, prescribed and proscribed conduct in matters relating to personal rights, control and distribution of personal wealth, infliction of harm on personal and social welfare, and others. In each of these spheres the character and effect of legal interaction with experience is most desirably a matter for systematic empirical inquiry.

Empirical inquiry suited to the needs of legal practice and legal education has a distinct focus based on a concern for (1) personal *and* social well-being within (2) both an individual *and* social spectrum. The scope of legal operation sets requirements for structure and substance in effective and systematic empirical inquiry that differ from a similar kind of inquiry within other institutional contexts. The nature of variables, the relationships studied and the interpretation of results within a continuing legal framework of inquiry are discrete. This holds significant implication for legal education in empirical methods and findings. There is a basic need for instruction in empirical methodologies. There is a need to develop an interpretive framework and translation skills in the methods and findings of other universes of empirical inquiry, such as the economic, the sociological, and the psychological, so that these become meaningful and useful within the legal context. There is the possibility of research framed by legal interest to provide insight and possible answers to problems of especially legal concern. And, there is the promise of a continuing framework for inquiry into areas of personal and social experience that are the subject for public policy consideration in which law's role may be vital.

An effective teaching and learning emphasis on law's empirical relations requires that empirical inquiry be an integral part of legal education. A continuing teaching and research institution geared minimally to empirical inquiry that is indigenous to law's interests perhaps ought to be a vital part of a law university. The regular participation of law faculty and students, at least minimally and within the limits of their interest and competence is needed. This and support through the representation of vital interests and skills from other disciplines is essential in formulating and executing methodology and useful inquiry. The meaning and value of such emphasis and inquiry within the context of the law university transcends classroom boundaries, challenges traditional legal methods and perspectives, and incorporates new and necessary perspectives and skills in legal practice. This provides an additional and alternative set of competences that are particularly necessary to the significant proportion of attorneys and law trained individuals whose roles and functions have mostly to do with policy determination, problem consultation, and personal and social planning.

At the level of personal experience and interaction law is concerned with: (1) accurate personal perception and sufficient awareness; (2) a proper regard for personal values; and (3) the effective interpretation of meanings and relationships in matters of distinctly personal and humanistic concern. The development of some skill in methods of psychological observation and interpretation, consonant with the requirements of legal interest, adds a significant measure of intelligence and sensitivity to the character of law. The teaching and learning of relevant skills in psychological inquiry in legal education is highly significant for the understanding of issues and the operation of law especially in matters of family relationship, in concerns about aberrant behavior, and in matters relating to personal rights and status. A good deal of transaction in law occurs through the medium of interpersonal relations. This, too, places a singular importance on the psychological dimensions of personal experience and personal relationships as determinants in legal experience tending to affect the character of both law and fact.

Psychological inquiry suited to the needs of legal practice and legal education seeks to develop intuitive and apperceptive skills so as to extend the awareness of behavior. It also seeks to develop more representative conceptions of personal behavior, incorporating both rational and non-rational dispositions, so as to increase the validity of personal behavior interpretation in social and legal contexts. Theory and methods from professional psychology need to be adequately refined and geared to fit the dimensions of inquiry and the kinds of purpose served by law. Caution needs to be taken that there is proper theoretical and methodological reconstruction else psychological inquiry in law becomes an amateur exercise in the problems, methods, and concepts bearing mostly on professional psychological matters.

The basic discipline of psychological inquiry is best developed in a law university through the continuous operation of a clinical program for teaching, exercise, and research purposes. The careful study and practice of interpersonal and small group relations, in the context of real and simulated problems of personal, social, and legal consequence, is the primary method and focus of instruction. The development of acute and systematic behavior assessment, and the development of legal counseling and negotiation skills, are the principal objectives. An important research and scholarship aim is the development of legal counseling and negotiation theory and technique, and this can be fostered through this vital clinical experience. Clinical exposure and training can also serve to formulate and test conceptions of behavior relevant to the matrix of personal-social-legal experience.

The principal law faculty interest and participation in clinical training is likely to occur in those teachers and scholars who are especially interested in law-related matters of personal conduct, in issues of family and social relationship, in methods and problems of factual and legal proof, and in the character of interpersonal relations involving lawyers. Working in concert with professionals in psychological inquiry and counseling, law teachers can stimulate interest and sharpen the skills of law students who are concerned in varying degrees with personal behavior. It may be suggested that a minimum course of clinical exposure should be requisite to each law student so that he can better comprehend the nature of some of the experience and the impact of law that he studies in the abstract in his traditional law courses. The development of a discrete set of clinical competences in law may be especially vital to the effective practice of law. It may also make a meaningful personal contribution to the effective engagement of legally trained persons in a variety of consultative and decision-making roles and functions.

Empirical inquiry and clinical practice are not new or totally neglected phenomena in legal education. They are served mainly through the efforts of some scholars who engage in research in legal process and through the experience of students in public defender, legal aid, and Office of Economic Opportunity programs. In places, efforts are also made to familiarize students with opinion survey methods, to give students observational experience in the clinical contexts of other professions, and to develop courses in legal counseling, scientific proof, fact-finding, or the like. The collateral use of teaching materials and instructors from one or more of the social and behavioral sciences and other disciplines reputes a distinctive character in legal education in some of the more notable law schools. Individual law teachers, principally through their literary scholarship and personal encouragement to students, undertake programmatic efforts to infuse law more consistently with elements of empirical reality. Emphases on "policy science," "preventive law," and the like, move in this direction. The development of law-and-(science, social science, medicine, psychiatry) institutes, and criminological institutes, is another kind of related undertaking on the periphery of legal education. So, too, is the encouragement and support of some foundations for individual scholarly work and research joining law and other disciplinary spheres. Imaginative programs of continuing legal education, oriented to the needs of practitioners who are beyond their law school years, also encourage familiarity with scientific concepts and methods especially relating to legal proof, and with the methods and findings of other professions whose work is appertinent to different areas and applications in law.

There is perhaps an important distinction in the programmatic prescriptions that are here advanced. It is the core of legal education, not a narrow sector of it or its periphery, that must be influenced. Traditional method and substance in legal education should not be replaced or even significantly infiltrated, but other traditions and emphases should be developed. Legal practice involves, and legal education should reflect, not one but at least three basic disciplines in law. In addition to rational inquiry into law and legal process, there is empirical inquiry into the context, the operations, and the effects of law in social organization and social process, and psychological inquiry into the character and meaning of the personal and social behavior with which law deals. Each of these needs to be vested in an institutional framework within a university of law. This will permit the newer disciplines the substance and position with which to compete effectively with traditional forms and content in law learning. The development of acceptance and tradition for innovative ideas and methods is most often a slow and grudging process. Significant and necessary innovations need to be programmed so that they: (1) are not met with disfavor by the sheer weight of traditional offerings; (2) do not prematurely compete with one another where there are limited resources; and (3) are temperized to some degree, without loss of basic integrity, so that they can be accommodated to existing structure.

Psychological conditions for effective learning and new educational development need to be observed. The "emotional climate" of the learning institution must provide at least a fair degree of receptivity for new learning modes and new content. At least an equal start in the curriculum must be given newer disciplines so that each has equal priority to make a significant imprint on the mind and interest of the general student body. The frankly experimental character of initial efforts and approaches needs to be recognized and acknowledged so that there is tolerance for failure and sufficient encouragement to change and further effort. Clearly, good will and conciliatory moods need to be encouraged and observed among faculty and students, else destructive schisms and tendencies to withdrawal and isolation occur. Clearly, too, those faculty who perform in innovative roles with new learning vehicles require great diplomacy and interpersonal skill to make their contributions meaningful and solid.

As a practical matter, the resources and the conditions for the scope of development here sought in legal education likely do not exist. Nonetheless, the challenge to make law more humanistic and socially conscious through a superior endowment from legal education continues to exist. It is perhaps significant that it is humanistic concern for and about law that continually encourages idealization about law and legal processes.

SOCIAL CHANGE AND THE LAW OF INDUSTRIAL ACCIDENTS

LAWRENCE M. FRIEDMAN* AND JACK LADINSKY**

Sociologists recognize, in a general way, the essential role of legal institutions in the social order.[1] They concede, as well, the responsiveness of law to social change and have made important explorations of the interrelations involved.[2] Nevertheless, the role law plays in initiating—or reflecting—social change has never been fully explicated, either in theory or through research. The evolution of American industrial accident law from tort principles to compensation systems is an appropriate subject for a case-study on this subject. It is a topic that has been carefully treated by legal scholars,[3] and it is also recognized by sociologists to be a significant instance of social change.[4] This essay, using concepts drawn from both legal and sociological disciplines, aims at clarifying the concept of social change and illustrating its relationship to change in the law.

I. The Concept of Social Change

Social change has been defined as "any nonrepetitive alteration in the established modes of behavior in . . . society."[5] Social change is change in the way people relate to each other, not change in values or in technology. Major alterations in values or technology will, of course, almost invariably be followed by changes in social relations—but they are not in themselves social change. Thus, although the change from tort law to workmen's compensation presupposed a high level of technology and certain attitudes toward the life and health of factory workers, it was not in itself a change in values or technology but in the patterning of behavior.

Social change may be revolutionary, but it normally comes about in a more-or-less orderly manner, out of the conscious and unconscious attempts of

---

* Professor of Law, University of Wisconsin. A.B., 1948, J.D., 1951, M.LL., University of Chicago, 1953.

** Assistant Professor of Sociology, University of Wisconsin. B.A., 1954, M.A., University of Missouri, 1957; Ph.D., University of Michigan, [illegible]

The authors wish to acknowledge the support of the Russell Sage Foundation's [illegible] Program at the University of Wisconsin. They also wish to express their [illegible]

[1] [illegible] Modern [illegible]

[2] [illegible] Law [illegible] Process in [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

people to solve social problems through collective action. It is purposive and rational; although social actions have unanticipated consequences and often arise out of unconscious motivations, nonetheless social change at the conscious level involves definition of a state of affairs as a "problem" and an attempt to solve that problem by the rational use of effective means. The *problem* defined collectively in this instance was the number of injuries caused to workmen by trains, mine hazards, and factory machinery. It is clear that the number of accidents increased over the course of the century, but it is not self-evident that this objective fact necessarily gave rise to a correspondent subjective sense of a problem that had to be solved in a particular way. To understand the process of social change, one must know how and why that subjective sense evolved. This requires knowledge of how and why various segments of society perceived situations—whether they identified and defined a set of facts or a state of affairs as raising or not raising problems.[6] It also requires an understanding of what were considered appropriate and rational means for solving that problem. The perspective of a particular period, in turn, sets limits to the way a people collectively defines problems and the means available for their solution.[7]

This essay deals with behavior at the societal level. At that level, social change necessarily means changes in powers, duties, and rights; it will normally be reflected both in custom and law, in formal authority relations and informal ones. In mature societies, law will be an important indicator of social change; it is institutional cause and institutional effect at the same time, and a part of the broader pattern of collective perceptions and behavior in the resolution of social problems. The essay will therefore also deal with the way in which legal systems respond to their society—the social impact on law, modified and monitored by the institutional habits of the legal system.

In legal terms, this is the story of the rise and fall of a *rule*, the fellow-servant rule, as the legal system's operating mechanism for allocating (or refusing to allocate) compensation for industrial injuries. It is an exploration of how the rule originated, how it changed, how and when it was overthrown.

II. DEVELOPMENT OF THE LAW OF INDUSTRIAL ACCIDENTS

A. *Background of the Fellow-Servant Rule*

At the [illegible] of the industrial revolution, the common law of torts afforded a remedy, as it still does, to those who had suffered injuries at the hands of others. If a man injured another by direct action—by striking him, or slandering him, or by trespassing on his property—the victim could sue for his damages. Similarly, the victim of certain kinds of negligent behavior had a remedy at law. But tort law was not highly developed. Negligence in particular did not loom large in the reports and it was not prominently discussed in books of theory or practice.[8] Indeed, no treatise on tort law appeared in America until Francis Hilliard's in 1859;[9] the first English treatise came out in 1860.[10] By this time, the field was rapidly developing. A third edition of Hilliard's book was published in 1866, only seven years after the first edition. The explosive growth of tort law was directly related to the rapidity of industrial development. The staple source of tort litigation was and is the impact of machines—railroad engines, then factory machines, then automobiles—on the human body. During the industrial revolution, the size of the factory labor force increased, the use of machinery in the production of goods became more widespread, and such accidents were inevitably more frequent. In Hilliard's pioneer treatise, railroads already played a major role in tort litigation—a role which he ascribed to their "great multiplication and constant activity; their necessary interference, in the act of construction, with the rights of property . . . the large number and various offices of their agents and servants; and the dangers, many of them of an entirely novel character, incident to their mode of operation. . . ."[11]

---

[6] A "collective problem solving" approach to the study of social change is set forth in detail in G. E. Swanson, [illegible]

[7] Thus, for example, the problem of [illegible] and feebleness of the aged can be "solved" by euthanasia, prayer, medicine, socialized medicine, or left to [illegible]-dependence on the society

In theory, at least, recovery for industrial accidents might have been assimilated into the existing system of tort law. The fundamental principles were broad and simple. If a factory worker was injured through the negligence of another person—including his employer—an action for damages would lie. Although as a practical matter, servants did not usually sue their master nor workers their employers, in principle they had the right to do so.

In principle, too, a worker might have had an action against his employer for any injury caused by the negligence of any other employee. The doctrine of *respondeat superior* was familiar and fundamental law. A principal was liable for the negligent acts of his agent. As Blackstone put it:

---

[8] Blackstone's *Commentaries* has virtually no discussion of negligence. In early 19th century America, tort law (and particularly the law of negligence) remained fairly obscure. Dane's *Abridgment*—an eight-volume compendium of British and American law—has a short, miscellaneous chapter on negligence: cases "which cannot be brought conveniently under more particular heads." 3 N. DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 31 (1824). These include some commercial and maritime instances ("If the owner of a ship, in the care of a pilot, through *negligence* and want of skill, sinks the ship of another, the owner is liable," *id.* at 35), and some cases of negligence in the practice of a trade or profession ("if a register of deeds neglects to record a deed as he ought to do, this action lies against him for his negligence," *id.* at 32). Under this latter heading comes one of the very few examples of personal injury—a doctor's negligent practice of his art. *Id.* at 32. Another example had to do with the negligent owner of a dog or other animal, *id.* at 34. But in general, personal injury cases are rare in Dane, and the shadow of the industrial revolution has not yet fallen on this corner of the law.

[9] F. HILLIARD, THE LAW OF TORTS (1st ed. 1859); see C. WARREN, HISTORY OF THE AMERICAN BAR 450 (1911).

[10] C. ADDISON, WRONGS AND THEIR REMEDIES (1st ed. 1860).

[11] 2 F. HILLIARD, THE LAW OF TORTS 339 (3d ed. 1866).

> he who does a thing by the agency of another, does it himself . . . . If an innkeeper's servants rob his guests, the master is bound to restitution. . . . So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master.[12]

Conceivably, then, one member of an industrial work force might sue his employer for injuries caused by the negligence of a fellow worker. A definitive body of doctrine was slow to develop, however. When it did, it rejected the broad principle of *respondeat superior* and took instead the form of the so-called fellow-servant rule. Under this rule, a servant (employee) could not sue his master (employer) for injuries caused by the negligence of another employee. The consequences of this doctrine were far reaching. An employee retained the right to sue the employer for injuries, provided they were caused by the employer's personal misconduct. But the factory system and corporate ownership of industry made this right virtually meaningless. The factory owner was likely to be a "soulless" legal entity; even if the owner was an individual entrepreneur, he was unlikely to concern himself physically with factory operations. In work accidents, then, legal fault would be ascribed to fellow employees, if anyone. But fellow employees were men without wealth or insurance. The fellow-servant rule was an instrument capable of relieving employers from almost all the legal consequences of industrial injuries. Moreover, the doctrine left an injured worker without any effective recourse but an empty action against his co-worker.

When labor developed a collective voice, it was bound to decry the rule as infamous,[13] as a deliberate instrument of oppression—a sign that law served the interests of the rich and propertied, and denied the legitimate claims of the poor and the weak. The rule charged the "blood of the workingman" not to the state, the employer, or the consumer, but to the working man himself.[14] Conventionally, then, the fellow-servant rule is explained as a deliberate or half-deliberate rejection of a well-settled principle of law in order to encourage enterprise by forcing workmen to bear the costs of industrial injury. And the overthrow of the rule is taken as a sign of a conquest by progressive forces.

It is neither possible nor desirable to avoid passing judgment on human behavior; but one's understanding of social processes can sometimes be hindered by premature moral assessments. The history of industrial accident law is much too complicated to be viewed as merely a struggle of capital against labor, with law as a handmaid of the rich, or as a struggle of good against evil. From the standpoint of social change, good and evil are social labels based on *perceptions* of conditions, not terms referring to conditions in themselves. Social change comes about when people decide that a situation is evil and must be altered, even if they were satisfied or unaware of the problem before. In order, then, to understand the legal reaction to the problem of industrial accidents, one must understand how the problem was perceived within the legal system and by that portion of society whose views influenced the law.

---

[12] 1 W. Blackstone, Commentaries *429-30.

[13] And Labor was not alone. "Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase," said the Secretary for Ireland in a famous remark to the House of Commons in 1897. *Quoted in* W. Dodd, Administration of Workmen's Compensation 5 n.7 (1936). Lord Abinger wrote the decision in Priestley v. Fowler, 150 Eng. R. 1030 (Ex. 1837); Baron Alderson in Hutchinson v. York, N. & B. Ry., 155 Eng. R. 150 (Ex. 1850).

[14] The slogan "The cost of the product should bear the blood of the working man" has been attributed to Lloyd George; it expresses the theory that the price of the commodity should include all costs, including that of industrial accidents. *See* W. Prosser, Torts 554-55 & n.3 (3d ed. 1964).

B. *Birth and Acceptance of the Rule*

The origin of the fellow-servant rule is usually ascribed to Lord Abinger's opinion in *Priestley v. Fowler*,[15] decided in 1837. Yet the case on its facts did not pose the question of the industrial accident, as later generations would understand it; rather, it concerned the employment relationships of tradesmen. The defendant, a butcher, instructed the plaintiff, his servant, to deliver goods which had been loaded on a van by another employee. The van, which had been overloaded, broke down, and plaintiff fractured his thigh in the accident. Lord Abinger, in his rather diffuse and unperceptive opinion, reached his holding that the servant had no cause of action by arguing from analogies drawn neither from industry nor from trade:

> If the master be liable to the servant in this action, the principle of that liability will . . . carry us to an alarming extent . . . . The footman . . . may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker. . . . The master . . . would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; . . . for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen. . . .[16]

These and similar passages in the opinion suggest that Abinger was worried about the disruptive effects of a master's liability upon his household staff. These considerations were perhaps irrelevant to the case at hand, the facts of which did not deal with the household of a nobleman, great landowner, or rich merchant; *a fortiori* the decision itself did not concern relationships within an industrial establishment. Certainly the opinion made extension of the rule to the factory setting somewhat easier to enunciate and formulate technically. But it did not justify the existence of an industrial fellow-servant rule. The case might have been totally forgotten—or overruled—had not the onrush of the industrial revolution put the question again and again to courts, each time more forcefully. *Priestley v. Fowler* and the doctrine of *respondeat superior* each stood for a broad principle. Whether the one or the other (or neither) would find a place in the law relative to industrial accidents depended upon needs felt and expressed by legal institutions in response to societal demands. Had there been no *Priestly v. Fowler*, it would have been necessary —and hardly difficult—to invent one.

---

[15] 150 Eng. R. 1030 (Ex. 1837).
[16] *Id.* at 1032.

In the United States, the leading case on the fellow-servant situation was *Farwell v. Boston & Worcester Railroad Corp.*,[17] decided by Massachusetts' highest court in 1842. The case arose out of a true industrial accident in a rapidly developing industrial state. Farwell was an engineer who lost a hand when his train ran off the track due to a switchman's negligence. As Chief Justice Shaw, writing for the court, saw it, the problem of *Farwell* was how best to apportion the risks of railroad accidents. In his view, it was superficial to analyze the problem according to the tort concepts of fault and negligence. His opinion spoke the language of contract, and employed the stern logic of nineteenth century economic thought. Some occupations are more dangerous than others. Other things being equal, a worker will choose the least dangerous occupation available. Hence, to get workers an employer will have to pay an additional wage for dangerous work. The market, therefore, has already made an adjustment in the wage rate to compensate for the possibility of accident, and a cost somewhat similar to an insurance cost has been allocated to the company. As Shaw put it, "he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and *in legal presumption, the compensation is adjusted accordingly*."[18] The worker, therefore, has assumed the risk of injury—for a price. The "implied contract of employment" between the worker and employer did not require the employer to bear any additional costs of injury (except for those caused by the employer's personal negligence).

In *Priestley v. Fowler* too, counsel had argued in terms of implied contract.[19] But Lord Abinger had not framed his logic accordingly. Shaw did, and his opinion had great influence on subsequent judicial reasoning. The facts of the case were appropriate and timely, and Shaw saw the issue in clear economic terms. His decision helped convert the rules and concepts of the status-bound law of master and servant to the economic needs of the period, as he understood them.[20]

---

[17] 45 Mass. (4 Met.) 49 (1842). Murray v. South Carolina R.R., 26 S.C.L. (1 McMul.) 385 (1841), was decided a year earlier and came to the same result. But *Farwell* is the better known case, the one usually cited and quoted. In England, Baron Alderson extended *Priestley* to a railroad accident situation in Hutchinson v. York, N. & B. Ry., 155 Eng. R. 150 (Ex. 1849). The House of Lords, in Barton's Hill Coal Co. v. Reid, 111 Rev. R. 896 (1858), held the rule applicable in Scotland as well as in England. Lord Cranworth cited *Farwell* with great praise as a "very able and elaborate judgment." *Id.* at [illegible]

[18] Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 57 (1842) (emphasis added).

[19] 150 Eng. R. 1030, 1031 (Ex. 1837).

[20] The same impulse motivated Timothy Walker, who introduced his discussion of master and servant in his text on American law with these words:

> The title of *master and servant*, at the head of a lecture, does not sound very

Shaw's opinion makes extreme assumptions about behavior, justified only by a philosophy of economic individualism.[21] Partly because of this, it has a certain heartlessness of tone. A disabled worker without resources was likely to be pauperized if he had no realistic right to damages. Unless his family could help him, he would have to fall back upon poor relief, the costs of which were borne by the public through taxation. The railroads and other industrial employers paid a share as taxpayers and, in addition, a kind of insurance cost as part of their wage rate—but no more. Additional damages had to be borne by the worker; if he could not bear them, society generally would pay the welfare costs. Thus the opinion expresses a preference for charging the welfare cost of industrial accidents to the public generally, rather than to the particular enterprise involved.

It is not surprising that such a preference was expressed. Shaw's generation placed an extremely high value on economic growth. As Willard Hurst has noted, that generation was thoroughly convinced it was "socially desirable that there be broad opportunity for the release of creative human energy," particularly in the "realm of the economy."[22] The establishment of a functioning railroad net was an essential element in economic growth. Furthermore, Shaw's resolution of the *Farwell* case is cruel only insofar as society makes no other provision for the victims of accidents—that is, if social insurance and public assistance are inadequate, degrading, or unfair. In a society with a just and workable system of state medical insurance and disability pensions, the *Farwell* solution would be neither inhumane nor inappropriate, even today. Indeed, it could be argued that the broader social responsibility is preferable to one which taxes a particular industry for the claims of its workers. Whether the one side or the other is correct, in economic or political terms, is not here relevant.

Of course, from today's viewpoint, the word "inadequate" is too weak a judgment on what passed for public relief in the early nineteenth century.

> harmoniously to republican ears. . . . But the legal relation of master and servant must exist, to a greater or less extent, wherever civilization furnishes work to be done, and the difference of condition makes some persons employers, and others laborers. In fact, we understand by the relation of master and servant, nothing more or less than that of *employer* and *employed*. It is, therefore, a relation created by contract, express or implied, and might properly be treated under the head of contract; but custom has placed it among the personal relations, and I shall so treat it.

T. Walker, Introduction to American Law § 114, at 275 (6th ed. 1837).

[21] "[*Farwell* represents] the individualistic tendency of the common law, which took it for granted that an employee was free to contract and was not bound to risk life or limb in any particular employment . . . ." W. Dodd, *supra* note 13, at 7. "[T]he leading employers' liability cases, from which the whole subsequent juristic development received its tone and direction, were decided at the very moment when the *laissez faire* movement in economic and political thought reached its culmination." E. Downey, History of Work Accident Indemnity in Iowa 13 (1912). *See also* F. Bohlen, Studies in the Law of Torts 461 [illegible] (1926).

[22] J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 5 [illegible] (1956).

Social insurance was unknown. Local poor relief was cruel, sporadic, and pinchpenny. Institutions for the helpless were indescribably filthy and heartless. Villages sometimes shunted paupers from place to place, to avoid the burden of paying for them. Moreover, the whole system was shot through with what strikes us today as an inordinate fear of the spread of idleness and a perverse notion that pauperism generally arose out of the moral failings of the poor. The most that can be said is that the system usually made a minimum commitment to keeping the poor alive.[23]

But our condemnation of nineteenth century welfare administration is based on a certain amount of hindsight. Social welfare is looked upon today as a task of government, and government can lay claim to far greater resources to accomplish welfare goals. In Shaw's day, private charity was assigned a higher place in the relief of misery. Probably most people would have agreed then that the disabled and wretched poor ought not to starve. Where private philanthropy failed, local poor relief stepped in. It was the most miserable sort of minimum, but its deficiencies were not apparent to the average middle or upper class citizen who seldom gave the matter a second thought—just as today the inadequacies of mental hospitals and prisons are only vaguely known and rarely given a second thought by most Americans. Poor relief was not ***perceived*** as a major social problem in the most literal sense. Furthermore, in Shaw's day certain kinds of crises and risks had to be accepted as inevitable, far more than they would be accepted today. High mortality rates from disease threatened all classes of society. Business entrepreneurs ran heavy risks; business failure was common and could be avoided only by great skill and good fortune. The instability of the monetary system threatened an entrepreneur with sudden, unpredictable, and uninsurable ruin. At the onset of the great business panic of 1857, for example, banks failed by the score; currency turned to ashes, and chain reactions of default were set off by distant collapse or defalcation.[24] Hardly any businessman was safe or immune. Furthermore, imprisonment for debt was still a living memory when Shaw wrote; the present national bankruptcy system did not exist, and local insolvency laws were chaotic and unpredictable.[25] Men like Shaw, the bearers of power and influence, might have conceded that the misfortunes of factory workers were real, but insecurity of economic position cursed the lot of all but the very rich. The problem was one of *general* insecurity.

Shaw and his generation placed their hopes of salvation on rapid economic growth.[26] Perhaps they were anxious to see that the tort system of accident compensation did not add to the problems of new industry. Few people imagined that accidents would become so numerous as to create severe economic and social dislocations. On the contrary, rash extension of certain principles of tort law to industrial accidents might upset social progress by imposing extreme costs on business in its economic infancy. The 1840's and 1850's were a period of massive economic development in New England and the Midwest, a period of "take-off" (perhaps) into self-sustaining economic growth.[27] Textiles, and then iron, spearheaded the industrial revolution; westward expansion and the railroads created new markets. Communities and states made a social contribution to the construction of railroads through cash subsidies, stock subscriptions, and tax exemptions. The courts, using the fellow-servant doctrine and the concepts of assumption of risk and contributory negligence,[28] socialized the accident costs of building the roads. That these solutions represented the collective, if uneasy, consensus of those with authority and responsibility is supported by the fact that every court of the country, with but one transient exception,[29] reached the same conclusion in the years immediately following *Farwell*. Moreover, the fellow-servant rule was not abolished by any legislature in these early years. Although legislative inaction is not a necessary sign of acquiescence, it at least indicates lack of a major feeling of revulsion.

---

[23] *See, e.g.*, D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866, at 211-[illegible] (1938). For a vivid description of early nineteenth century poor relief administration, see M. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CALIF. L. REV. 511, 528-30 (1966).

[24] *See* B. HAMMOND, BANKS AND POLITICS IN AMERICA (1957).

[25] For a discussion of legal and political aspects of the short-lived national bankruptcy acts before 1898, see C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).

> [26] It is generally assumed that the "considerations of policy" invoked by Shaw in the Farwell case were those in favor of the promotion of railroad and industrial expansion. Charles Warren . . . observed that railroads began to operate only 8 years before the Farwell decision, and quoted an 1883 writer to the effect that the decision was "a species of protective tariff for the encouragement of infant railway industries." The United States Supreme Court has said that the "assumption of risk" doctrine was "a judicially created rule . . . developed in response to the general impulse of common law courts . . . to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business." "The general purpose behind this development in the common law," the Court continued, "seems to have been to give maximum freedom to expanding industry." Tiller v. Atlantic Coast Line Railroad, 318 U.S. 54, 58-59 (1943).

AUERBACH 84-85; *see* W. DODD, *supra* note 13, at 7; E. DOWNEY, *supra* note 21, at 15; E. FREUND, STANDARDS OF AMERICAN LEGISLATION 21 (1917); A. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 58.

[27] The 1840's were marked by rail and manufacturing development in the East. The 1850's brought heavy foreign capital inflow and the railroad push into the Midwest. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 38 (1960).

[28] For these doctrines see W. PROSSER, *supra* note 14, at 426-28, 450. Both are essentially 19th century doctrines—indeed, Prosser feels assumption of risk "received its greatest impetus" from *Priestley v. Fowler*. *Id.* at 450 & n.3. On the significance in American law of the doctrine of contributory negligence, see the important article by Wex Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

[29] Wisconsin, in Chamberlain v. Milwaukee & M.R.R., 11 Wis. 248 (1860), rejected the fellow-servant rule, but one year later, in Moseley v. Chamberlain, 18 Wis. 700 (1861), the court reversed itself and adopted the rule which was "sustained by the almost unanimous judgments of all the courts both of England and this country . . . [an] unbroken current of judicial opinion." *Id.* at 736.

C. *Weakening the Rule*

A general pattern may be discerned which is common to the judicial history of many rules of law. The courts enunciate a rule, intending to "solve" a social problem—that it, they seek to lay down a stable and clear-cut principle by which men can govern their conduct or, alternatively, by which the legal system can govern men. If the rule comports with some kind of social consensus, it will in fact work a solution—that is, it will go unchallenged, or, if challenged, will prevail. Challenges will not usually continue, since the small chance of overturning the rule is not worth the cost of litigation. If, however, the rule is weakened—if courts engraft exceptions to it, for example—then fresh challenges probing new weaknesses will be encouraged. Even if the rule retains *some* support, it will no longer be efficient and clear-cut. Ultimately, the rule may no longer serve *anybody's* purposes. At this point, a fresh (perhaps wholly new) "solution" will be attempted.

The history of the fellow-servant rule rather neatly fits this scheme. Shaw wrote his *Farwell* opinion in 1842. During the latter part of the century, judges began to reject his reasoning. The "tendency in nearly all jurisdictions," said a Connecticut court in 1885, was to "limit rather than enlarge" the range of the fellow-servant rule.[30] A Missouri judge in 1891 candidly expressed the change in attitude:

> In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the forms of corporations engaged in varied, detached and widespread operations . . . it has been seen and felt that the universal application of the [fellow-servant] rule often resulted in hardship and injustice. Accordingly, the tendency of the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer under these circumstances a due and just share of the responsibility for the lives and limbs of the persons in its employ.[31]

The rule was strong medicine, and it depended for its efficacy upon continued, relatively certain, and unswerving legal loyalty. Ideally, if the rule were strong and commanded nearly total respect from the various agencies of law, it would eliminate much of the mass of litigation that might otherwise arise. Undoubtedly, it did prevent countless thousands of law suits; but it did not succeed in choking off industrial accident litigation. For example, industrial accident litigation dominated the docket of the Wisconsin Supreme Court at the beginning of the age of workmen's compensation; far more cases arose under that heading than under any other single field of law.[32] Undoubtedly, this appellate case-load was merely the visible portion of a vast iceberg of litigation. Thus, the rule did not command the respect required for efficient operation and hence, in the long run, survival.

---

[30] Ziegler v. Danbury & N.R.R., 52 Conn. 543, 556 (1885).

[31] Parker v. Hannibal & St. J.R.R., 109 Mo. 362, 397 (1891) (Thomas, J., dissenting).

[32] Unpublished survey and classification of all Wisconsin Supreme Court cases 1905-1915, by Robert Friebert and Lawrence M. Friedman.

One reason for the continued litigation may have been simply the great number of accidents that occurred. At the dawn of the industrial revolution, when Shaw wrote, the human consequences of that technological change were unforeseeable. In particular, the toll it would take of human life was unknown. But by the last quarter of the nineteenth century, the number of industrial accidents had grown enormously. After 1900, it is estimated, 35,000 deaths and 2,000,000 injuries occurred every year in the United States. One quarter of the injuries produced disabilities lasting more than one week.[33] The railway injury rate doubled in the seventeen years between 1889 and 1906.[34]

In addition to the sheer number of accidents, other reasons for the increasing number of challenges to the rule in the later nineteenth century are apparent. If the injury resulted in death or permanent disability, it broke off the employment relationship; the plaintiff or his family thereafter had nothing to lose except the costs of suit. The development of the contingent fee system provided the poor man with the means to hire a lawyer. This system came into being, in the words of an investigating committee of the New York State Bar:

> shortly after the beginning of that which we now call the age of machinery. With the advent of steam and the vast variety of machines for its application to the service of mankind, came a multitude of casualties. This resulted in . . . a class of litigants, whose litigation theretofore had only involved controversies in small transactions . . . calling for the services of inexpensive lawyers. In the new era . . . the poor man found himself pitted . . . against corporations entrenched in wealth and power. . . . Thus resulted a great crop of litigation by the poor against the powerful. . . .[35]

The contingent fee system was no more than a mechanism, however. A losing plaintiff's lawyer receives no fee; that is the essence of the system. The

---

[33] E. Downey, *supra* note 21, at 1-2, gives these estimates based on U.S. Bureau of Labor Bull. No. 78, at 458.

[34] Accidents were about 2.5 per 100 railway employees in 1889 and 5 per 100 in 1906. Calculated from ICC figures reported in [1909-1910] Wis. Bureau of Labor and Industrial Statistics Fourteenth Biennial Rep. 99 (1911).

Railroads had been the earliest major source of industrial accidents, and most of the leading American and English fellow-servant cases arose out of railroad accidents. Railroads accounted for more serious industrial accidents than any other form of enterprise in the middle of the 19th century. But in the late 19th century, mining, manufacturing, and processing industries contributed their share to industrial injury and death. For example, close to 80% of the employer liability cases that reached the Wisconsin Supreme Court before 1890 related to railroad accidents; from 1890 to 1907 less than 30% were railroad cases. [1907-1908] Wis. Bureau of Labor and Industrial Statistics Thirteenth Biennial Rep. 26 (1909). In 1907-1908, manufacturing injuries and deaths were more than double those of the railroads. [1909-1910] Wis. Bureau of Labor and Industrial Statistics Fourteenth Biennial Rep. 79 (1911).

[35] Report of Committee on Contingent Fees, 31 Proceedings of the N.Y. St. B. Ass'n 99, 100-01 (1908). The elite of the bar always looked with suspicion upon the contingent fee. But the system was a source of livelihood to many members of the bar, and it suited the American proposition that justice was classless and open to all.

fact is that plaintiffs won many of their lawsuits; in so doing, they not only weakened the fellow-servant rule, but they encouraged still more plaintiffs to try their hand, still more attorneys to make a living from personal injury work. In trial courts, the pressure of particular cases—the "hard" cases in which the plight of the plaintiff was pitiful or dramatic—tempted judges and juries to find for the little man and against the corporate defendant. In Shaw's generation, many leading appellate judges shared his view of the role of the judge; they took it as their duty to lay down grand legal principles to govern whole segments of the economic order. Thus, individual hardship cases had to be ignored for the sake of higher duty. But this was not the exclusive judicial style, even in the appellate courts. And in personal injury cases, lower court judges and juries were especially prone to tailor justice to the case at hand. For example, in Wisconsin, of 307 personal injury cases involving workers that appeared before the state supreme court up to 1907, nearly two-thirds had been decided in favor of the worker in the lower courts. In the state supreme court, however, only two-fifths were decided for the worker.[36] Other states undoubtedly had similar experiences. Whether for reasons of sympathy with individual plaintiffs, or with the working class in general, courts and juries often circumvented the formal dictates of the doctrines of the common law.

Some weakening of the doctrine took place by means of the control exercised by trial court judge and jury over findings of fact. But sympathy for injured workers manifested itself also in changes in doctrine. On the appellate court level, a number of mitigations of the fellow-servant rule developed near the end of the nineteenth century. For example, it had always been conceded that the employer was liable if he was personally responsible (through his own negligence) for his worker's injury. Thus, in a Massachusetts case, a stable owner gave directions to his employee, who was driving a wagon, that caused an accident and injury to the driver (or so the jury found). The employer was held liable.[37] Out of this simple proposition grew the so-called vice-principal rule, which allowed an employee to sue his employer where the negligent employee occupied a supervisory position such that he could more properly be said to be an alter ego of the principal than a mere fellow-servant. This was a substantial weakening of the fellow-servant doctrine. Yet some states never accepted the vice-principal rule; in those that did, it too spawned a bewildering multiplicity of decisions, sub-rules, and sub-sub-rules. "The decisions on the subject, indeed, are conflicting to a degree which, it may safely be affirmed, is without a parallel in any department of jurisprudence."[38] This statement appeared in a treatise, written on the eve of workmen's compensation, which devoted no fewer than 524 pages to a discussion of the ramifications of the vice-principal rule.

---

[36] [1907-1908] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS THIRTEENTH BIENNIAL REP. 85-86 (1909).

[37] Haley v. Case, 142 Mass. 316, 7 N.E. 877 (1886). In *Priestley v. Fowler* itself the same point was made.

[38] 4 C. LABATT, MASTER AND SERVANT 4143 (1913).

There were scores of other "exceptions" to the fellow-servant rule, enunciated in one or more states. Some of them were of great importance. In general, an employer was said to have certain duties that were not "delegable"; these he must do or have done, and a failure to perform them laid him open to liability for personal injuries. Among these was the duty to furnish a safe place to work, safe tools, and safe appliances. Litigation on these points was enormous, and here too the cases cannot readily be summed up or even explained. In *Wedgwood v. Chicago & Northwestern Railway Co.*[39] the plaintiff, a brakeman, was injured by a "large and long bolt, out of place, and which unnecessarily, carelessly and unskillfully projected beyond the frame, beam or brakehead, in the way of the brakeman going to couple the cars."[40] The trial court threw the case out, but the Wisconsin Supreme Court reversed:

> It is true, the defendant . . . is a railroad corporation, and can only act through officers or agents. But this does not relieve it from responsibility for the negligence of its officers and agents whose duty it is to provide safe and suitable machinery for its road which its employees are to operate.[41]

So phrased, of course, the exception comes close to swallowing the rule. Had the courts been so inclined, they might have eliminated the fellow-servant rule without admitting it, simply by expanding the safe place and safe tool rules. They were never quite willing to go that far, and the safe tool doctrine was itself subject to numerous exceptions. In some jurisdictions, for example, the so-called "simple tool" rule applied:

> Tools of ordinary and everyday use, which are simple in structure and requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer[s] for injuries resulting from such defects.[42]

Doctrinal complexity and vacillation in the upper courts, coupled with jury freedom in the lower courts, meant that by the end of the century the fellow-servant rule had lost much of its reason for existence: it was no longer an efficient cost-allocating doctrine. Even though the exceptions did not go the length of obliterating the rule, and even though many (perhaps most) injured workers who had a possible cause of action did not or could not recover, the instability and unpredictability of operation of the common law rule was a significant fact.

---

[39] 41 Wis. 478 (1877).

[40] *Id.* at 479.

[41] *Id.* at 483.

[42] Dunn v. Southern Ry., 151 N.C. 313, 315, 66 S.E. 134-35 (1909); *see* 3 C. LABATT, *supra* note 38, at 2476-81.

The numerous judge-made exceptions reflected a good deal of uncertainty about underlying social policy. The same uncertainty was reflected in another sphere of legal activity—the legislature. Though the rule was not formally abrogated, it was weakened by statute in a number of jurisdictions. Liability statutes, as will be seen, were rudimentary and in many ways ineffective. This was partly because of genuine uncertainty about the proper attitude to take toward industrial accident costs—an uncertainty reflected in the cases as well. The early nineteenth century cannot be uncritically described as a period that accepted without question business values and practices. Rather, it accepted the ideal of economic growth, which certain kinds of enterprise seemed to hinder. Thus in the age of Jackson, as is well known, popular feeling ran high against financial institutions, chiefly the chartered banks. Banks were believed to have far too much economic power; they corrupted both the currency and the government. They were a "clog upon the industry of this country."[43] But many a good judge, who decried the soulless corporation (meaning chiefly the moneyed kind) in the best Jacksonian tradition, may at the same time have upheld the fellow-servant rule. One did not, in other words, necessarily identify the interests of the common man with industrial liability for personal injuries.

Later on, the railroads replaced the banks as popular bogeymen. By the 1850's some of the fear of excessive economic power was transferred to them. Disregard for safety was one more black mark against the railroads; farmers, small businessmen, and the emerging railroad unions might use the safety argument to enlist widespread support for general regulation of railroads, but the essential thrust of the movement was economic. The railroads were feared and hated because of their power over access to the market. They became "monopolistic" as the small local lines were gradually amalgamated into large groupings controlled by "robber barons." Interstate railroad nets were no longer subject to local political control—if anything, they controlled local politics, or so it plausibly appeared to much of the public. Farmers organized and fought back against what they identified as their economic enemy. It is not coincidental that the earliest derogations from the strictness of the fellow-servant rule applied *only* to railroads. For example, the first statutory modification, passed in Georgia in 1856, allowed railroad employees to recover for injuries caused by the acts of fellow-servants, provided they themselves were free from negligence.[44] A similar act was passed in Iowa in 1862.[45] Other statutes were passed in Wyoming (1869)[46] and Kansas (1874).[47] The chron ology suggests—though direct evidence is lacking—that some of these statutes were connected with the general revolt of farmers against the power of the railroad companies, a revolt associated with the Granger movement, which achieved its maximum power in the 1870's.[48] Wisconsin in 1875 abolished the fellow-servant rule for railroads; in 1880, however, when more conservative forces regained control of the legislature, the act was repealed.[49]

---

[43] T. Sedgwick, Jr., *What is a Monopoly?* (1835), *quoted in* SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 220, 231 (Blau ed. 1954).

[44] No. 103, [1855] Ga. Acts 155.

[45] Ch. 169, § 7, [1862] Iowa Laws 198.

[46] Ch. 65, [1869] Wyo. Terr. Laws 433.

[47] Ch. 93, §1, [1874] Kan. Laws 143.

The Granger revolt, and similar movements, were not without lessons for the railroad companies. Despite the fall of Granger legislatures, the legal and economic position of the railroads was permanently altered. Great masses of people had come to accept the notion that the power of the railroads was a threat to farmers and a threat to the independence and stability of democratic institutions. Out of the ashes of ineffective and impermanent state regulation of railroads arose what ultimately became a stronger and more systematic program of regulation, grounded in federal power over the national economy.

The Interstate Commerce Commission was created in 1887,[50] chiefly to outlaw discrimination in freight rates and other practices deemed harmful to railroad users. The original legislation had nothing to say about railroad accidents and safety. But this did not long remain the case. The railroads had become unpopular defendants relatively early in American legal history. By 1911, twenty-five states had laws modifying or abrogating the fellow-servant doctrine for railroads.[51] Railroad accident law reached a state of maturity earlier than the law of industrial accidents generally; safety controls were imposed on the roads, and the common law tort system was greatly modified by removal of the employer's most effective defense. The Interstate Commerce Commission called a conference of state regulatory authorities in 1889; the safety problem was discussed, and the Commission was urged to investigate the problem and recommend legislation.[52] In 1893, Congress required interstate railroads to equip themselves with safety appliances, and provided that any employee injured "by any locomotive, car, or train in use" without such appliances would not "be deemed . . . to have assumed the risk thereby occasioned."[53]

The Federal Employers' Liability Act of 1908[54] went much further; it abolished the fellow-servant rule for railroads and greatly reduced the strength of contributory negligence and assumption of risk as defenses. Once the employers had been stripped of these potent weapons, the relative probability of recovery by injured railroad employees was high enough so that workmen's compensation never seemed as essential for the railroads as for industry generally. The highly modified FELA tort system survives (in amended form) to this day for the railroads.[55] It is an anachronism, but one which apparently grants some modest satisfaction to both sides. Labor and management both express discontent with FELA, but neither side has been so firmly in favor of a change to workmen's compensation as to make it a major issue.[56]

---

[48] *See generally* R. HUNT, LAW AND LOCOMOTIVES (1958).

[49] Ch. 173, [1875] Wis. Laws 293 (*repealed*, Ch. 232, [1880] Wis. Laws 270). A new act, somewhat narrower than that of 1875, was passed in 1889. Ch. 348, [1889] Wis. Laws 487.

[50] Interstate Commerce Act § 11, 24 Stat. 379 (1887). As much as workmen's compensation, the development of utility regulation was a kind of compromise among interests. Under public regulation, companies gain freedom from local political harassment and uncontrolled competition; they are virtually guaranteed a "fair" but limited return on investment. In exchange, they agree to accept supervision and regulation by the general government.

[51] 1 A. LARSON, WORKMEN'S COMPENSATION § 4.50, at 30 (1965).

[52] 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 246 n.4 (1931).

[53] Safety Appliance Act, 27 Stat. 531-32 (1893) (now 45 U.S.C. § 7 (1964)).

[54] 35 Stat. 65 (1908).

FELA shows one of many possible outcomes of the decline in efficacy of the fellow-servant rule. Under it, the rule was eliminated, and the law turned to a "pure" tort system—pure in the sense that the proclivities of juries were not interfered with by doctrines designed to limit the chances of a worker's recovery. But the railroads were a special case. Aside from the special history of regulation, the interstate character of the major railroads made them subject to national safety standards and control by a single national authority. For other industrial employers, the FELA route was not taken; instead, workmen's compensation acts were passed. In either case, however, the fellow-servant rule was abolished, or virtually so. Either course reflects, we can assume, some kind of general agreement that the costs of the rule outweighed its benefits.

D. *Rising Pressures for Change*

The common law doctrines were designed to preserve a certain economic balance in the community. When the courts and legislatures created numerous exceptions, the rules lost much of their efficiency as a limitation on the liability of businessmen. The rules prevented many plaintiffs from recovering, but not all; a few plaintiffs recovered large verdicts. There were costs of settlements, costs of liability insurance, costs of administration, legal fees and the salaries of staff lawyers. These costs rose steadily, at the very time when American business, especially big business, was striving to rationalize and bureaucratize its operations. It was desirable to be able to predict costs and insure against fluctuating, unpredictable risks. The costs of industrial accident liability were not easily predictable, partly because legal consequences of accidents were not predictable. Insurance, though available, was expensive

In addition, industry faced a serious problem of labor unrest. Workers and their unions were dissatisfied with many aspects of factory life. The lack of compensation for industrial accidents was one obvious weakness. Relatively few injured workers received compensation. Under primitive state employers' liability statutes, the issue of liability and the amount awarded still depended upon court rulings and jury verdicts. Furthermore, the employer and the insurance carrier might contest a claim or otherwise delay settlement in hopes of bringing the employee to terms. The New York Employers' Liability Commission, in 1910, reported that delay ran from six months to six years.

---

[55] The 1908 act was limited to railroad employees injured while engaged in interstate commerce. A 1906 act [Act of June 22, 1906, ch. 3073, 34 Stat. 232] had been declared invalid by the Supreme Court in the Employers Liability Cases, 207 U.S. 463 (1908), because it applied to employees not engaged in interstate commerce. The 1908 act was liberalized in 1910 and in 1939. *See* 45 U.S.C. §§ 51-60 (1964). *See generally* V. Miller, *FELA Revisited*, 6 CATHOLIC U.L. REV. 158 (1957).

[56] Arguments by supporters and opponents of FELA are reviewed in H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 320-25 (1954).

> The injured workman is driven to accept whatever his employer or an insurance company chooses to give him or take his chance in a lawsuit. Half of the time his lawsuit is doomed to failure because he has been hurt by some trade risk or lacks proof for his case. At best he has a right to retain a lawyer, spend two months on the pleadings, watch his case from six months to two years on a calendar and then undergo the lottery of a jury trial, with a technical system of law and rules of evidence, and beyond that appeals and perhaps reversals on questions that do not go to the merits. . . . If he wins, he wins months after his most urgent need is over.[57]

When an employee did recover, the amount was usually small. The New York Commission found that of forty-eight fatal cases studied in Manhattan, eighteen families received no compensation; only four received over $2,000; most received less than $500. The deceased workers had averaged $15.22 a week in wages; only eight families recovered as much as three times their average yearly earnings.[58] The same inadequacies turned up in Wisconsin in 1907. Of fifty-one fatal injuries studied, thirty-four received settlements under $500; only eight received over $1,000.[59]

Litigation costs consumed much of whatever was recovered. It was estimated that, in 1907, "of every $100 paid out by [employers in New York] on account of work accidents but $56 reached the injured workmen and their dependents." And even this figure was unrepresentative because it included voluntary payments by employers. "A fairer test of employers' liability is afforded by the $192,538 paid by these same employers as a result of law suits or to avoid law suits, whereof only $80,888, or forty-two percent, reached the beneficiaries."[60] A large fraction of the disbursed payments, about one-third, went to attorneys who accepted the cases on a contingent basis.[61]

These figures on the inadequacy of recoveries are usually cited to show how little the workers received for their pains. But what did these figures mean to employers? Assuming that employers, as rational men, were anxious to pay as little compensation as was necessary to preserve industrial peace and maintain a healthy workforce, the better course might be to pay a higher *net* amount direct to employees. Employers had little or nothing to gain from their big payments to insurance companies, lawyers, and court officials. Perhaps at some unmeasurable point of time, the existing tort system crossed an invisible line and thereafter, purely in economic terms, represented on balance a net loss to the industrial establishment. From that point on, the success of a movement for change in the system was certain, provided that businessmen could be convinced that indeed their self-interest lay in the direction of reform and that a change in compensation systems did not drag with it other unknowable and harmful consequences.

---

[57] Quoted in W. Dodd, *supra* note [illegible], at [illegible]24.
[58] *Id.* at 19.
[59] *Id.* at 20-21.
[60] E. Downey, *supra* note 21.
[61] *See* W. Dodd, *supra* note 1[illegible], at [illegible]2.

As on many issues of reform, the legal profession did not speak with one voice. Certainly, many lawyers and judges were dissatisfied with the status quo. Judges complained about the burdens imposed on the court system by masses of personal injury suits; many felt frustrated by the chaotic state of the law, and others were bothered by their felt inability to do justice to injured workmen. One writer noted in 1912:

> [A]mendatory legislation in scores of separate jurisdictions have made employers' liability one of the most involved and intricate branches of the law, have multiplied definitions more recondite and distinctions more elusive than those of the marginal utility theory, and have given rise to conflicts of decisions that are the despair of jurists.[62]

Some influential judges despaired of piecemeal improvements and played an active role in working for a compensation system. In a 1911 opinion, Chief Justice J. B. Winslow of Wisconsin wrote:

> No part of my labor on this bench has brought such heartweariness to me as that ever increasing part devoted to the consideration of personal injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law . . . make[s] drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself . . . . These rules are archaic and unfitted to modern industrial conditions . . . .
>
> When [the faithful laborer] . . . has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public . . . be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?
>
> These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the government.[63]

---

[62] E. DOWNEY, *supra* note 21, at 17.

[63] Driscoll v. Allis-Chalmers Co., 144 Wis. 451, 468-69, 129 N.W. 401, 408-09 (1911); *see* Monte v. Wausau Paper Mills Co., 132 Wis. 205, 209, 111 N.W. 1114, 1115 (1907) (Winslow, C.J.).

Justice Roujet D. Marshall propagandized for workmen's compensation in his judicial opinions.[64] He claimed in his autobiography "to have been largely the exciting cause of the establishment of the workmen's compensation law" in Wisconsin.[65] He also wrote part of the governor's message to the 1909 legislature appealing for a workmen's compensation statute, and he helped induce the Republican Party to back a workmen's compensation plan in its 1910 platform.[66] Legal writers and law teachers also spoke out against the common law and in favor of a compensation system. Roscoe Pound voiced a common opinion in 1907:

> [I]t is coming to be well understood by all who have studied the circumstances of modern industrial employment that the supposed contributory negligence of employees is in effect a result of the mechanical conditions imposed on them by the nature of their employment, and that by reason of these conditions the individual vigilance and responsibility contemplated by the common law are impossible in practice.[67]

In 1911, when the New York Court of Appeals unanimously declared the nation's first workmen's compensation statute unconstitutional,[68] Dean Pound and thirteen other "experts in political and Constitutional law" issued a lengthy statement in an influential New York City weekly newspaper, *The Outlook*, which the editors summarized as demonstrating that the "decision of the Court of Appeals of the State of New York is not in accordance with the best legal authorities in the United States."[69]

When considerations of politics were added to those of business economics and industrial peace, it was not surprising to find that businessmen gradually withdrew their veto against workmen's compensation statutes. They began to say that a reformed system was inevitable—and even desirable. A guaranteed, insurable cost—one which could be computed in advance on the basis of accident experience—would, in the long run, cost business less than the existing system.[70] In 1910, the president of the National Association of Manufacturers (NAM) appointed a committee to study the possibility of compensating injured workmen without time-consuming and expensive litigation, and the convention that year heard a speaker tell them that no one was satisfied with the present state of the law—that the employers' liability system was "antagonistic to harmonious relations between employers and wage workers."[71] By 1911 the NAM appeared convinced that a compensation system was inevitable and that prudence dictated that business play a positive role in shaping the design of the law—otherwise the law would be "settled for us by the demagogue, and agitator and the socialist with a vengeance."[72] Business would benefit economically and politically from a compensation system, but only if certain conditions were present. Business, therefore, had an interest in pressing for a specific kind of program, and turned its attention to the details of the new system. For example, it was imperative that the new system be in fact as actuarially predictable as business demanded; it was important that the costs of the program be fair and equal in their impact upon particular industries, so that no competitive advantage or disadvantage flowed from the scheme. Consequently the old tort actions had to be eliminated, along with the old defenses of the company. In exchange for certainty of recovery by the worker, the companies were prepared to demand certainty and predictability of loss—that is, limitation of recovery. The jury's caprice had to be dispensed with. In short, when workmen's compensation became law, as a solution to the industrial accident problem, it did so on terms acceptable to industry. Other pressures were there to be sure, but when workmen's compensation was enacted, businessmen had come to look on it as a positive benefit rather than as a threat to their sector of the economy.

---

[64] *See, e.g.*, Houg v. Girard Lumber Co., 144 Wis. 337, 352, 129 N.W. 633, 639 (1911) (separate opinion); Monaghan v. Northwestern Fuel Co., 140 Wis. 457, 466, 122 N.W. 1066, 1070 (1909) (dissenting opinion).

[65] 2 AUTOBIOGRAPHY OF ROUJET D. MARSHALL 53 (Glasier ed. 1931).

[66] *Id.* at 239-46.

[67] R. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 614 (1907). The entire April 1906 issue of *The Green Bag* was devoted to employers' liability and workmen's compensation. See, particularly, R. Newcomb, *The Abuse of Personal Injury Litigation*, 18 GREEN BAG 196, 199-200 (1906). *See also* F. Walton, *Workmen's Compensation and the Theory of Professional Risk*, 11 COLUM. L. REV. 36 (1911); E. Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129 (1911).

[68] Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), *declaring unconstitutional* Ch. 674, [1910] N.Y. Law 1945.

[69] *The Workmen's Compensation Act: Its Constitutionality Affirmed*, 98 THE OUTLOOK 709-11 (1911). Lyman Abbott, editor of *The Outlook*, and his contributing editor, Theodore Roosevelt, wrote frequently about employers' liability and compensation statutes. See especially the issue of April 29, 1911, 97 THE OUTLOOK 955-60 (1911).

Roosevelt, as President, had stated as early as 1907 that "it is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring because of the necessary exigencies of their daily occupation should be thrust upon those sufferers who were least able to bear it. . . ." E. DOWNEY, *supra* note 21, at 277 n.549.

E. *The Emergence of Workmen's Compensation Statutes*

The change of the businessman's, the judge's, and the general public's attitudes toward industrial injuries was accelerated by the availability of fresh information on the extent of accidents and their cost to both management and workers. By 1900, industrial accidents and the shortcomings of the fellow-servant rule were widely perceived as *problems* that had to be solved. After 1900, state legislatures began to look for a "solution" by setting up commissions to gather statistics, to investigate possible new systems, and to recommend legislation.[73] The commissions held public hearings and called upon employers, labor, insurance companies, and lawyers to express their opinions and propose changes. A number of commissions collected statistics on industrial accidents, costs of insurance, and amounts disbursed to injured workmen. By 1916, many states and the federal government had received more-or-less extensive public reports from these investigating bodies.[74] The reports included studies of industrial accident cases in the major industries, traced the legal history of the cases, and looked into the plight of the injured workmen and their families.

---

[70] For a comparison of the cost efficiency of the two systems, see generally W. Dodd, Administration of Workmen's Compensation 737-83 (1936).

[71] National Association of Manufacturers, Proceedings of the Fifteenth Annual Convention 280 (1910).

[72] National Association of Manufacturers, Proceedings of the Sixteenth Annual Convention 106 (1911) (remarks of Mr. Schwedtman).

From the information collected, the commissions were able to calculate the costs of workmen's compensation systems and compare them with costs under employers' liability. Most of the commissions concluded that a compensation system would be no more expensive than the existing method,[75] and most of them recommended adoption, in one form or another, of workmen's compensation. In spite of wide variations in the systems proposed, there was agreement on one point: workmen's compensation must fix liability upon the employer regardless of fault.

Between 1910 and 1920 the method of compensating employees injured on the job was fundamentally altered in the United States. In brief, workmen's compensation statutes eliminated (or tried to eliminate) the process of fixing civil liability for industrial accidents through litigation in common law courts. Under the statutes, compensation was based on statutory schedules, and the responsibility for initial determination of employee claims was taken from the courts and given to an administrative agency. Finally, the statutes abolished the fellow-servant rule and the defenses of assumption of risk and contributory negligence. Wisconsin's law, passed in 1911, was the first general compensation act to survive a court test.[76] Mississippi, the last state in the Union to adopt a compensation law, did so in 1948.[77]

Compensation systems varied from state to state, but they had many features in common. The original Wisconsin law was representative of the earlier group of statutes. It set up a voluntary system--a response to the fact that New York's courts had held a compulsory scheme unconsitutional on due process grounds.[78] Wisconsin abolished the fellow-servant rule and the defense of assumption of risk for employers of four or more employees. In turn, the compensation scheme, for employers who elected to come under it, was made the "exclusive remedy" for an employee injured accidentally on the job. The element of "fault" or "negligence" was eliminated, and the mere fact of injury at work "proximately caused by accident," and not the result of "wilful misconduct," made the employer liable to pay compensation but exempt from ordinary tort liability.[79] The state aimed to make it expensive for employers to stay out of the system. Any employer who did so was liable to suit by injured employees and the employer was denied the common law defenses.

---

[73] *For example*, in 1907, Illinois required employers to report their employees' accidents to the State's Bureau of Labor Statistics. [1907] Ill. Laws [illegible].

[74] *See* W. Dodd, *supra* note 70, at 18.

[75] For example, the Wisconsin Bureau of Labor and Industrial Statistics argued, on the basis of cost estimates in 1908, that:

> Employers' liability insurance costs now in Wisconsin from 12 cents per $100 of wages in knitting mills to at least $2.00 in some building operations—an average of 50 or 60 cents. But it is very probable that this expense would be increased in the near future by weakening the defenses of the employer in the courts. . . . The cost of the present system would be sufficient to inaugurate a general system of compensation [illegible].

[1907-1908] Wis. Bureau of Labor and Industrial Statistics, Thirteenth Biennial Rep. (1909), [illegible].

[76] [illegible] (1911).

[77] [illegible]

The compensation plans strictly limited the employee's amount of recovery. In Wisconsin, for example, if an accident caused "partial disability," the worker was to receive 65% of his weekly loss in wages during the period of disability, not to exceed four times his average annual earnings.[80] The statutes, therefore, were compensatory, not punitive, and the measure of compensation was, subject to strict limitations, the loss of earning power of the worker. In the original Wisconsin act, death benefits were also payable to dependents of the worker. If the worker who died left "no person dependent upon him for support," the death benefit was limited to "the reasonable expense of his burial, not exceeding $100."[81] Neither death nor injury as such gave rise to a right to compensation—only the fact of economic loss to someone, either the worker himself or his family. The Wisconsin act authorized employers to buy annuities from private insurance companies to cover projected losses. Most states later made insurance or self-insurance compulsory. Some states have socialized compensation insurance, but most allow the purchase of private policies.[82]

In essence, then, workmen's compensation was designed to replace a highly unsatisfactory system with a rational, actuarial one. It should not be viewed as the replacement of a fault-oriented compensation system with one unconcerned with fault. It should not be viewed as a victory of employees over employers. In its initial stages, the fellow-servant rule was not concerned with fault, either, but with establishing a clear-cut, workable, and predictable rule, one which substantively placed much of the risk (if not all) on the worker. Industrial accidents were not seen as a social problem—at most as an economic problem. As value perceptions changed, the rule weakened; it developed exceptions and lost its efficiency. The exceptions and counter-exceptions can be looked at as a series of brief, ad hoc, and unstable compromises between the clashing interests of labor and management. When both sides became convinced that the game was mutually unprofitable, a compensation system became possible. But this system was itself a compromise: an attempt at a new, workable, and predictable mode of handling accident liability which neatly balanced the interests of labor and management.

---

[78] Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911).

[79] Ch. 50, § 1, [1911] Wis. Laws 43, 44.

[80] Ch. 50, § 1, [1911] Wis. Laws 46.

[81] Ch. 50, § 1, [1911] Wis. Laws 48.

[82] *See* A. Reede, Adequacy of Workmen's Compensation 231-38 (1947); H. Somers & A. Somers, *supra* note 56, at 95-112.

III. THE LAW OF INDUSTRIAL ACCIDENTS AND SOCIAL THEORY: THREE ASPECTS OF SOCIAL CHANGE

This case study, devoted to the rise and fall of the fellow-servant rule, utilizes and supports a view of social change as a complex chain of group bargains—economic in the sense of a continuous exchange of perceived equivalents, though not economic in the sense of crude money bargains. It also provides a useful setting for evaluating three additional popular explanations of the origin or rate of social change. First, the apparently slow development of workmen's compensation is the classic example of what Ogburn called "cultural lag." Second, since German and English statutes were enacted prior to the American laws, the establishment of compensation schemes in America can be viewed as a case of cross-cultural influence. Third, the active role of particular participants (in Wisconsin, for example, Judge Marshall and John R. Commons) may substantiate the theory which advances the causal influence of "great men" in the process of social change. A thorough examination of these theories is not contemplated here. Students both of law and of sociology, however, may profit from a brief discussion of these theories in the context of the social change embodied in workmen's compensation statutes.

A. *The Concept of Cultural Lag*

The problem of "fair and efficient incidence of industrial accident costs," in the words of Willard Hurst, "followed a fumbling course in courts and legislature for fifty years before the first broad-scale direction [leading to workmen's compensation] was applied."[63] In a famous book written in 1922, the sociologist William Fielding Ogburn used the example of workmen's compensation and the fifty-year period of fumbling to verify his "hypothesis of cultural lag."[64] "Where one part of culture changes first," said Ogburn, "through some discovery or invention, and occasions changes in some part of culture dependent upon it, there frequently is a delay . . . . The extent of this lag will vary . . . but may exist for . . . years, during which time there may be said to be a maladjustment."[85] In the case of workmen's compensation, the lag period was from the time when industrial accidents became numerous until the time when workmen's compensation laws were passed, "about a half-century, from 1850-70 to 1915." During this period, "the old adaptive culture, the common law of employers' liability, hung over after the material conditions had changed."[86]

---

[63] J. Willard Hurst, [illegible] and Social Process in [illegible] States History 69 ([illegible]

[64] W. Ogburn, Social Change With Respect to Culture and Original Nature 200 ([illegible] ed. [illegible]). See generally id. at [illegible]. In the book cultural lag was [illegible]; in later writing Ogburn referred to it as a theory.

The concept of cultural lag is still widely used, in social science and out—particularly since its popularization by Stuart Chase in *The Proper Study of Mankind*.[87] And the notion that law fails to adjust promptly to the call for change is commonly voiced. In popular parlance, this or that aspect of the law is often said to "lag behind the times." This idea is so pervasive that it deserves comment quite apart from its present status in sociological thought.

The lesson of industrial accident law, as here described, may be quite the opposite of the lesson that Ogburn drew. In a purely objective (nonteleological) sense, social processes—and the legal system—cannot aptly be described through use of the idea of lag. When, in the face of changed technology and new problems, a social arrangement stubbornly persists, there are *social* reasons why this is so; there are explanations why no change or slow change occurs. The legal system is a part of the total culture; it is not a self-operating machine. The rate of response to a call for change is slow or fast in the law depending upon who issues the call and who (if anybody) resists it. "Progress" or "catching up" is not inevitable or predictable. Legal change, like social change, is a change in behavior of individuals and groups in interaction. The rate of change depends upon the kind of interaction. To say that institutions lag is usually to say no more than that they are slow to make changes of a particular type. But why are they slow? Often the answer rests on the fact that these institutions are controlled by or respond to groups or individuals who are opposed to the specific change. This is lag only if we feel we can confidently state that these groups or individuals are wrong as to their own self-interest as well as that of society. Of course, people *are* often wrong about their own self-interest; they can be and are short-sighted, ignorant, maladroit. But ignorance of this kind exists among progressives as well as among conservatives—among those who want change as well as among those who oppose it. Resistance to change is "lag" only if there is only one "true" definition of a problem and one "true" solution.

There were important reasons why fifty years elapsed before workmen's compensation became part of the law. Under the impact of industrial conditions

---

[85] *Id.* at 201.

[86] *Id.* at 236.

[87] See S. Chase, The Proper Study of Mankind 115-17 (1st ed. 1948). For other applications of cultural lag, see H. Hart, *Social Theory and Social Change*, in Symposium on Sociological Theory 196, 219-25 (Gross ed. 1959). *See generally* H. Hart, *The Hypothesis of Cultural Lag: A Present Day View*, in Technology and Social Change 417-34 (Allen ed. 1957).

Americans were changing their views about individual security and social welfare. Dean Pound has remarked that the twentieth century accepts the idea of insuring those unable to bear economic loss, at the expense of the nearest person at hand who can bear the loss. This conception was relatively unknown and unacceptable to judges of the nineteenth century.[88] The fellow-servant rule could not be replaced until economic affluence, business conditions, and the state of safety technology made feasible a more social solution. Labor unions of the mid-nineteenth century did not call for a compensation plan; they were concerned with more basic (and practical) issues such as wages and hours. Note the form that the argument for workmen's compensation took, after 1900, in the following quotation; few Americans reasoned this way fifty years earlier.

> [S]uppose you carry an accident policy and are negligent in stepping from a street car. Do you not expect the insurance company to pay? If you negligently overturn a lamp and your house burns, do you not expect the fire insurance company to pay? That is what insurance is for—to guard against the slips and mistakes that are characteristics of human nature. . . .
>
> Before granting a pension do we ask whether a man used due care in dodging the bullets, or do we plead that he voluntarily assumed the risk? Then why, when a man courageously volunteers to do the dangerous work in transportation, mining, building, etc., should it seem wrong to grant him or his dependents compensation in case of accidents?[89]

Social insurance, as much as private insurance, requires standardization and rationalization of business, predictability of risk, and reliability and financial responsibility of economic institutions. These were present in 1909, but not in 1850.

Prior to workmen's compensation, the legal system reflected existing conflicts of value quite clearly; the manifold exceptions to the fellow-servant rule and the primitive liability statutes bear witness to this fact. These were no symptoms of "lag"; rather, they were a measure of the constant adjustments that inevitably take place within a legal system that is not insulated from the larger society but an integral part of it. To be sure, the courts frequently reflected values of the business community and so did the legislatures, but populist expressions can easily be found in the work of judges, legislatures and juries. In the absence of a sophisticated measuring-rod of past public opinion—and sophisticated concepts of the role of public opinion in nineteenth century society—who is to say that the legal system "lagged" behind some hypothetical general will of the public or some hypothetically correct solution?

The concept of lag may also be employed in the criticism of the courts' use of judicial review to retard the efficacy of social welfare legislation. In

---

[88] R. Pound, *The Economic Interpretation and the Law of Torts*, 53 Harv. L. Rev. 365, 376 (1940).

[89] [1907-1908] Wis. Bureau of Industrial and Labor Statistics Thirteenth Biennial Rep. (1909), *quoted in* Auerbach 586.

1911, the New York Court of Appeals declared the state's compulsory workmen's compensation act unconstitutional. As a result of this holding, the state constitution had to be amended—two years later—before workmen's compensation was legally possible in New York.[90] Because of the New York experience, six states also amended their constitutions and others enacted voluntary plans. The issue was not finally settled until 1917, when the United States Supreme Court held both compulsory and elective plans to be constitutional.[91] But it adds little to an understanding of social process to describe this delay in terms of the concept of cultural lag. Courts do not act on their own initiative. Each case of judicial review was instigated by a litigant who represented a group in society which was fighting for its interests as it perceived them; these were current, real interests, not interests of sentiment or inertia. This is completely apart from consideration of what social interests the courts thought they were serving in deciding these cases—interests which hindsight condemns as futile or wrong, but which were living issues and interests of the day.

Conflicts of value also arose in the legislatures when they began to consider compensation laws. The Massachusetts investigating commission of 1903 reported a workmen's compensation bill to the legislature, but the bill was killed in committee on the ground that Massachusetts could not afford to increase the production costs of commodities manufactured in the state.[92] Once more, the emergence of compensation depended upon a perception of inevitability—which could cancel the business detriment to particular states which enacted compensation laws—and of general economic gain from the new system. It is not enough to sense that a social problem exists. Rational collective action demands relatively precise and detailed information about the problem, and clear placement of responsibility for proposing and implementing a solution. For many years legislatures simply did not consider it their responsibility to do anything about industrial injuries. Since they did not view accidents as a major social problem, and since state legislatures were weak political structures, they were content at first to leave accidents to tort law and the courts.[93] Moreover, state agencies were not delegated the task of collecting information on the nature and extent of industrial accidents until relatively late. The Wisconsin legislature created a Bureau of Labor and Industrial Statistics in 1883, but did not provide for the collection of data on industrial accidents until 1905.[94] When a need for accident legislation was perceived, individual legislators, under pressure of constituencies, began to introduce work accident indemnity bills. Some were inadequately drafted; most were poorly understood. In order to appraise potential legislation, investigating commissions were created to collect information, weigh the costs and report back alternative solutions.

---

[90] N.Y. CONST. art. 1, § 19, was added in 1913; the new compensation law it authorized was enacted that same year. *See* Ch. 816, [1913] N.Y. Laws 2277.

[91] New York Cent. R.R. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917). In Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), the Court also held an exclusive state insurance fund to be constitutional.

[92] R. Warner, *Employers' Liability as an Industrial Problem*, 18 GREEN BAG 185, 192 (1906).

[93] "Laying the personal injury burdens of production upon the things produced . . . should have been efficiently recognized long ago, and would have been had the lawmaking power appreciated that it is its province, not that of the courts, to cure infirmity in the law." Borgnis v. Falk Co., 147 Wis. 327, 370, 133 N.W. 209, 223 (1911) (Marshall, J., concurring).

What appears to some as an era of "lag" was actually a period in which issues were collectively defined and alternative solutions posed, and during which interest groups bargained for favorable formulations of law. It was a period of "false starts"—unstable compromise formulations by decision makers armed with few facts, lacking organizational machinery, and facing great, often contradictory, demands from many publics. There was no easy and suitable solution, in the light of the problem and the alignment of powers. Indeed, workmen's compensation—which today appears to be a stable solution—was only a compromise, an answer acceptable to enough people and interest groups to endure over a reasonably long period of time.

Part of what is later called "lag," then, is this period of false starts—the inadequate compromises by decision makers faced with contradictory interest groups pressing inconsistent solutions. There may not *be* a "solution" in light of the alignment of interests and powers with respect to the problem at any given point in time. Perhaps only a compromise "solution" is possible. What later appears to be the final answer is in fact itself a compromise—one which is stable over some significant period of time. Sociologically, that is what a "solution" to a problem is: nothing more than a stable compromise acceptable to enough people and interest groups to maintain itself over a significant period of time. Theoretically, of course, total victory by one competing interest and total defeat of another is possible. But in a functioning democratic society, total victories and defeats are uncommon. Total defeat would mean that a losing group was so utterly powerless that it could exert no bargaining pressure whatsoever; total victory similarly would imply unlimited power. In the struggle over industrial accident legislation, none of the interests could be so described. Different perceptions of the problem, based at least in part on different economic and social stakes, led to different views of existing and potential law. When these views collided, compromises were hammered out. Workmen's compensation took form not because it was (or is) perfect, but because it represented a solution acceptable enough to enough interests to outweigh the costs of additional struggle and bargaining. If there was "lag" in the process, it consisted of acquiescence in presently acceptable solutions which turned out not to be adequate or stable in the long run. "Lag" therefore at most means present-minded pragmatism rather than long-term rational planning.[95]

---

[94] Ch. 496, §§ 1-3, [1905] Wis. Laws 680, 682.

B. *Cross-Cultural Borrowing*

The adoption of workmen's compensation in America does represent an instance of what can be called conscious cross-cultural borrowing. Workmen's compensation was not an American innovation; there were numerous European antecedents. Switzerland passed a workmen's compensation act in 1881; Germany followed in 1884 with a more inclusive scheme. By 1900 compensation laws had spread to most European countries. In 1891 the United States Bureau of Labor commissioned John Graham Brooks to study and appraise the German system. His report, published in 1893, was widely distributed and successfully exposed some American opinion-leaders to the existence of the European programs.[96] Most of the state investigating commissions also inquired into the European experience, and a number of early bills were modeled after the German and British systems.

Though workmen's compensation can therefore be viewed as an example of cross-cultural borrowing, care must be exercised in employing the concept. Successful legal solutions to social problems are often borrowed across state and national lines but this borrowing must not be confused with the actual "influence" of one legal system over another. "Influence" carries with it an implication of power or, at the least, of cultural dominance. The forces that led to a demand for workmen's compensation were entirely domestic, as this study has argued. The fact that European solutions to similar problems were studied and, to an extent, adopted here shows not dominance but an attempt to economize time, skill, and effort by borrowing an appropriate model. It would be quite wrong to detect European legal "influence" in this process. The existence of the European compensation plans was not a cause of similar

---

[95] Other instances of supposed cultural lag can be analyzed in similar terms. For example, Ogburn used exploitation of the forests and the tardy rise of conservation laws as another illustration of the lag. *See* W. OGBURN, *supra* note 84, at 203-10. Professor Hurst's elaborate study of law and the Wisconsin lumber industry demonstrates that the legal system supported the exploitation of the forests of Wisconsin in the 19th century; the public did not and would not consider the ultimate social costs of destroying the forests. "Common opinion through the lumber era considered that the public interest *had no greater concern* than the increase of the productive capacity of the general economy." J. WILLARD HURST, LAW AND ECONOMIC GROWTH 201 (1964) (emphasis added). "[T]he dominant attention of nineteenth-century policy was upon promotional rather than regulative use of law." *Id.* The crucial problem was how to develop and settle the continent, not how to conserve or reforest. Certainly no one was concerned with playgrounds for unborn urban masses. People backed demands arising out of immediate interests: the development of stable, economically prosperous communities. Courts reflected these attitudes. Blindness to future needs for natural resources did not result from evil intentions or from a yielding to the "pine barons"; the law reflected "prevailing community values," seeking concrete solutions to problems concretely and currently perceived. *Id.*

[96] *See* 1 A. LARSON, WORKMEN'S COMPENSATION § 5.20 (1964).

American statutes. Rather, the interest shown in the foreign experiences was a response to American dissatisfaction with existing industrial accident law.[97] Similarly, the current drive for an American *ombudsman* is not an example of the "influence" of Scandinavian law. A foreign model here sharpens discussion and provides a ready-made plan. Yet the felt need for such an officer has domestic origins.

C. *Great Men and Social Change*

Sociologists are fond of pointing out the inaccuracy of the "great-man theory of history," which holds that particular persons play irreplaceably decisive roles in determining the path of social change. The influence of single individuals, they say, is hardly as critical as historians would have us believe.[98] The role of outstanding persons in bringing about workmen's compensation acts seems on one level quite clear. In Wisconsin, Roujet Marshall excoriated the existing system from the bench; off the bench he was a vigorous champion of the new law and, indeed, helped draft it. John R. Commons worked tirelessly for passage of the act, and served on the first Industrial Commission whose obligation it was to administer the law.[99] His writings and teachings helped mobilize informed public opinion and virtually created a lobby of academicians for workmen's compensation. Political figures, businessmen, union leaders, and others played active roles in the passage of the law. It is quite tempting to say that the Wisconsin law would be unthinkable but for the work of Marshall, or Commons, or LaFollette and the Progressive tradition in the state, or the craftsmanship of Wisconsin's pioneering legislative reference service under the skilled leadership of Charles McCarthy.[100] Reformers and academicians served as important middlemen in mediating between interest groups and working out compromises. Their arguments legitimated the act; their zeal enlisted support of middle-class neutrals. They were willing to do the spadework of research, drafting, and propagandizing necessary for a viable law. In the passage of many other welfare and reform laws, outstanding personalities can be found who played dominant roles in creating and leading public opinion—for example, Lawrence Veiller for the New York tenement housing law of 1901,[101] Harvey Wiley for the Federal Food and Drug Act.[102]

The great-man hypothesis is not susceptible of proof or disproof. But the course of events underlying workmen's compensation at least suggests that social scientists are properly suspicious of placing too much reliance on a great-man view. If the view here expressed is correct, then economic, social, political and legal forces made workmen's compensation (or some alternative, such as FELA) virtually inevitable by the end of the nineteenth century. Outstanding men may be necessary in general for the implementation of social change; someone must take the lead in creating the intellectual basis for a change in perception. Nonetheless, when a certain pattern of demand exists in society, more than one person may be capable of filling that role. Particular individuals are normally not indispensable. The need is for talent—men with extraordinary ability, perseverance, and personal influence, men who can surmount barriers and accomplish significant results. Obviously, the absence of outstanding persons interested in a particular cause can delay problem solving or lead to inept, shoddy administration. The appearance of truly exceptional persons at the proper moment in history is undoubtedly not automatic. But talent, if not genius, may well be a constant in society; and the social order determines whether and in what direction existing talent will be exerted.

---

[97] Of course, cross-cultural borrowing of legal institutions presupposes a certain level of world interchange of culture. At the time workmen's compensation was adopted, American intellectuals were in close communication with Europe, and academics were in particular infatuated with things German. African or Asiatic models—had they existed—most likely would have been ignored. America was disposed to learn from Englishmen and Germans, not from Chinese or Bantu.

[98] *See, e.g.*, FREEDMAN 83 (rev. ed. 1956).

[99] *See* 2 J. COMMONS, INSTITUTIONAL ECONOMICS 854 (1934).

[100] On McCarthy, see J. COMMONS, MYSELF 107-11 (1934).

[101] *See generally* R. LUBOVE, THE PROGRESSIVES AND THE SLUM (1962).

[102] *See* O. ANDERSON, JR., THE HEALTH OF A NATION (1958).

Thus, it would be foolish to deny that specific individuals exert great influence upon the development of social events, and equally foolish to conclude that other persons could not have done the job as well (or better) if given the opportunity. "Great men," however, must be in the right place, which means that society must have properly provided for the training and initiative of outstanding persons and for their recruitment into critical offices when needed. In difficult times, great businessmen, political leaders, musicians, or physicists will emerge. "Great men" appear "when the time is ripe"—but only insofar as society has created the conditions for a pool of creative manpower dedicated to the particular line of endeavor in which their greatness lies.

POSTSCRIPT: WORKMEN'S COMPENSATION AND AFTER

We have called workmen's compensation a solution to the problem that called it forth, defining a solution as a stable compromise. In what sense can the present system be called stable? A literature of attack on it is certainly at hand.[103] It has been criticized as not "adaptable enough to keep abreast of a changing environment";[104] some say it has not "removed litigiousness";[105] at mid-century, others report that "despite the progress from the modest beginnings of 50 years ago, employers and labor are both dissatisfied with workmen's compensation."[106] In what sense, then, has workmen's compensation been a solution at all?

---

[103] *See generally* H. SOMERS & A. SOMERS, *supra* note 56, at 268-89; A. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 56, 63-91.

[104] H. SOMERS & A. SOMERS, *supra* note 56, at 269.

[105] *See id.* at 178; A. Brodie, *supra* note 103, at 63.

[106] A. Brodie, *supra* note 103, at 74.

It has certainly not been stable in the sense of unchanging. Few, if any statutory programs have been so frequently tampered with. Not a session of the Wisconsin legislature, for example, goes by without amendments—some major, some minor—proposed and frequently passed.[107] Many changes have also come about through judge-made law, or through judicial ratification of changes initiated by the various state commissions. The original concept of the industrial accident almost seems buried under layers of statutory and judicial accretion. In some states compensation may be paid for heart attacks suffered on the job.[108] Not *all* heart attacks, to be sure, are compensable; the hairline distinctions and causistry involved in deciding which ones bring recovery rival the ramifications of the fellow-servant rule at its height.[109] Thousands of accidents are compensable that have nothing to do with the impact of machine upon man in an industrial setting. A bartender hit by a stray bullet fired by a customer's wife,[110] a teacher struck by a student's missile,[111] and a traveling salesman burnt in his sleep by a hotel fire[112] have recovered for their losses. Moreover, the law seems to have wandered from the notion that compensation covers only economic loss. Thus, losses of arms and legs are compensable without showing a connection with the injured man's power to earn,[113] and awards have been occasionally made for disfigurement seemingly unrelated to earning capacity.[114] The full significance of these and other changes would require extensive treatment in itself. But the stupendous number of reported cases, the huge bulk of the technical literature on the law of compensation, and the constant statutory tinkering with the program indicate that workmen's compensation has embarked on a voyage comparable to that of the fellow-servant rule, except that the direction is toward expanding rather than contracting a principle. Compensation is stable, then, only in the sense that it is the base onto which accretions are added. The many changes are in it and to it, not from it. In this respect it is similar to the federal income tax law—constantly amended and tinkered with, but in the predictable future accepted in essential structure as a fact of legal and social life.

If all the tendencies of the case law were followed to their logical limit, then workmen's compensation would end up covering workers for all illnesses, injuries, and disabilities which might be linked somehow to the job—either causally, or because they happened during working hours. Present law is far from reaching this point, and most likely it cannot reach it, within the limits of a compensation system. Vastly increased coverage would levy an unacceptable tax on industry, and if compensation reached the point where it became a kind of total social insurance for workers, industry would demand further spreading of the risk. Institutionally, it is difficult for courts and legislatures to go fast or far *within* a compensation system, since the traditional limits of the system help define its legitimacy, and its legitimacy in turn suggests definite limits. The words of the statute prevent judges from going past a certain invisible point in stretching language. Legislatures make only marginal changes because of the absence, so far, of a strong sustained call for a great broadening of scope.

---

[107] Thus, in 1963 the Wisconsin statute was amended so that (among other things) a worker who suffers injury on the job and whose hearing aid is damaged, can recover also for the damage to his hearing aid. Wis. Stat. Ann. § 102.01 (Supp. 1966).

[108] *E.g.*, Rebsamen West, Inc. v. Bailey, 396 S.W.2d 822 (Ark. Sup. Ct. 1965).

[109] *See generally* 1 A. Larson, *supra* note 96, at § 38.64 (1965); J. Wigginton, *The Heart of the Working Man—A Post Mortem*, 17 U. Fla. L. Rev. 543 (1965).

[110] Industrial Indem. Co. v. Industrial Accident Comm'n, 95 Cal. App. 2d 804, 214 P.2d 41 (Dist. Ct. App. 1950).

[111] Whitney v. Rural Independent School Dist. No. 4, 232 Iowa 61, 4 N.W.2d 394 (1942).

[112] Wiseman v. Industrial Accident Comm'n, 46 Cal. 2d 570, 297 P.2d 649 (1956).

[113] Alaska Indus. Bd. v. Chugach Elec. Ass'n, 356 U.S. 320, 323 (1958).

[114] See 2 A. Larson, *supra* note 96, at § [illegible]

One possible change in direction would be an abandonment of compensation in favor of a more comprehensive plan secured by state insurance. Such a change would give up the theory that compensation costs are allocated in accordance with industrial responsibility for the injuries of employees and replace it with a more general social theory of welfare and risk. The British have reached this stage.[115] Whether the United States will in the near future is doubtful. Old-age assistance, medicare and other welfare programs may blunt the demand—or, conversely, they may prepare the way for it. Perhaps workmen's compensation will fall if the irrationalities of the present system become so gross that all parties in interest agree to abandon it, just as the fellow-servant rule was abandoned.

In short, workmen's compensation is in the second of the three stages which the fellow-servant rule itself went through—the stage of technical complexity and unstable compromise. Nothing here is intended to suggest that the third stage must come within some definite time-period or that it must come at all. To make definite predictions would be foolish. Even sensible guessing is not possible without careful comparative study of the life-cycle of legal rules and doctrines. It is clear, however, that the general three-stage pattern followed by the fellow-servant rule is quite common.[116] This is because such a pattern is the natural result of the impact of social change, moving more or less in one definite direction, upon a given area of law. If the proper societal demands are made, wide-reaching changes in law inevitably come about; and the process of change in the law, despite enormous diversities, produces noticeable regularities of behavior.

---

[115] National Insurance (Industrial Injuries) Act of 1946, 9 & 10 Geo. 6, ch. 62, *as amended*, 11 & 12 Geo. 6, ch. 42 (1948).

[116] Another example is provided by the national quotas system in immigration law, which was unpopular with some groups and under attack throughout its history. Immigration Act of 1924, ch. 190, 43 Stat. 153. It went through a period of high complexity and unstable compromises before being abolished in 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911. In the middle stage, the basic restrictive features of immigration law were complicated by private immigration and naturalization bills, as well as special statutory provisions for relatives of citizens, refugees, and others. Between 1952 and 1965 probably "two out of every three immigrants entered the United States outside the quota restrictions." It was finally replaced by a more "liberal" bill, which carefully protected the vital interests of those groups which opposed free, open immigration, while removing the complexity and iniquity of the system of national quotas. *See* T. Scully, *Is the Door Open Again?—A Survey of our New Immigration Law*, 13 U.C.L.A.L. Rev. 227, 236 (1966). *See generally id.* at 242-44.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1966 April, 1966 Number 2

THE PRACTICE OF JUSTICE

HARRY W. JONES*

> The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This eighteenth annual lecture was delivered March 9, 1966.

Thirty-five years ago, I studied Contracts at the feet of the great teacher whose memory honors this series of annual lectures. I could not now recite a single rule I learned from Tyrrell Williams or state the facts of any case we covered in his course. What I retain from Professor Williams' teaching is something incomparably more important, his insistence that the administration of law is not a closed system but a social process and that legal reasoning requires not only powers of abstraction and logical inference but also continuing acts of imaginative perception and ethical judgment. Best of all I remember a morning in the fall of 1931 when I began to put away childish things and understand what law in life is all about.

Professor Williams began his Contracts class that day by expounding one of his wonderful hypothetical cases and inviting volunteers. Angels would have feared to tread there, but I rushed in with a confident and categorical answer. Professor Williams looked over his glasses quizzically, shook his head to brush me off, and called on someone else. Strong in the valor of ignorance I took up the argument with him after class. To be sure, his analysis of the problem case had made it plain that the result for which I was contending would be unfair as between the parties to the supposed controversy. But what of that? I was relying on an impeccable general proposition of law, and the syllogism in which my argument moved from major premise to conclusion was steady and remorseless, or so it seemed to me. "And so, sir," I concluded, "isn't that the way your case would have to go?"

---

* Cardozo Professor of Jurisprudence, Columbia University.

Tyrrell Williams was kind, but his vast kindness was tempered with intellectual toughness as every great teacher's must be. "You are losing sight of the merits of the case," he said. "That decision would be terribly unjust on the facts I gave you. You know—or ought to by now—that no decent judge would reach that result in my case."

"But, sir," I persisted, "that is how he would have to decide it, whether he wanted to or not."

"Have to, my eye!" replied my master. "It isn't very often that a judge has to decide a case unjustly. He'd find a way to decide it right—and so would you if you could get it through your head this is a *case,* not an exercise in algebra."

This was the greatest of the countless lessons I learned from Tyrrell Williams during the three years I was his student and the three additional years, here at Washington University, when I was his colleague on the law faculty but his student still. It is appropriate, I think, that I make this crucial lesson the subject of our 1966 Tyrrell Williams Lecture. Individual case "merits" are fully as influential as general legal rules as factors in how cases actually get decided. It is only rarely in our legal order that the justness of a claim is not the strongest argument that can be made in support of its recognition. Jurisprudential theory is remote from the reality of law in action unless it takes full and sufficient account of this element of individual justice in the administration of law. The practicing lawyer who ignores this fact of legal life does so at his peril.

I. The Binocular Vision of Justice

"A *case,* not an exercise in algebra!" Professor Williams' crisp reminder of the primacy of the case for the practice of justice came back to me many years later at a university seminar on the professions, when I heard a great internist[1] describe the practice of his profession. There are, he said, two equally important elements in medical practice, the science of medicine and the art of healing. The art without the science is at best benevolent quackery, the science without the art cold and limited in therapeutic effectiveness. The great physician is master of them both, learned in the science of his profession and, at the same time, possessed of a sympathetic vision that sees the patient before him not just as a more or less standard example of encephalitis or Parkinsonism but as a unique and complex individual, a whole man of personal dignity and inalienable singularity.

---

[1] Dr. Dana W. Atchley, Professor Emeritus of Clinical Medicine, College of Physicians and Surgeons, Columbia University. The University Seminar on the Professions, which met at Columbia from 1950 to 1953 under the chairmanship of the distinguished sociologist, Robert K. Merton, was supported by a grant from the Russell Sage Foundation. The Seminar was composed of members representing eight professions: medicine, law, architecture, engineering, social work, the ministry, nursing, and education.

Similarly, I suggest, there are two equally important elements in the administration of justice, the science of law—for legal precepts and legal reasoning have at least some of the attributes of a science—and what I will call the art of the lawyer. Every case that comes to a court for decision—or to a lawyer's office for counseling or advocacy—is, on the scientific view of things, an item for conceptual analysis and classification. *Doe v. Roe* is, we say, an equal protection case or a third party beneficiary case or a constructive trust case, and this classification brings the applicable rules and precedents into play for analysis, argument, and judicial explanation. But *Doe v. Roe* is more than a specimen for classification; it has its further reality as a concrete dispute between living claimants and calls for a fair and just disposition between them.

Which is the ultimate reality, the general rule or the concrete case? To ask this is to enter a battleground over which philosophers have fought for many centuries. Are we to associate ourselves with the philosophical "realists" and so locate ultimate legal reality in the area of the universal, the general legal proposition or concept? Or are we to join forces with the philosophical "nominalists" and assert that only concrete cases are real and general legal concepts but names devised for convenient groupings of singular reality? In law, no such hard choice is forced on us. Realism and nominalism are two ways of seeing, and our adjudicative tradition makes use of them both.

Consider, as our analogy, the following passage from Ernst Cassirer's *Essay on Man:*

> In science we try to trace phenomena back to their first causes, and to general laws and principles. In art we are absorbed in their immediate appearance, and we enjoy this appearance to the fullest extent in all its richness and variety. . . . The two views of truth are in contrast with one another, but not in conflict or contradiction. . . . The psychology of sense perception has taught us that without the use of both eyes, without a binocular vision, there would be no awareness of the third dimension of space. The depth of human experience in the same sense depends on the fact that we are able to vary our modes of seeing, that we can alternate our views of reality.[2]

This is the heart of what I have to say in this Tyrrell Williams Lecture. Legal reality has a twofold aspect. There is a "science" of law in which every case is, in truth, an illustration of a general rule. There is an "art" of law in which the focus of perception is on the individual case, in all its immediacy and singularity. "The particular in isolation," Felix Frankfurter once wrote, "is meaningless; the generalization without concreteness, sterile."[3] Without binocular vision, without the use of both eyes, there can be no true understanding of the problem of justice as it exists in law in life.

---

[2] CASSIRER, AN ESSAY ON MAN 169-70 (Yale ed. 1962).

Here, I suggest, is the middle ground between a jurisprudence of conceptions, in which legal rules are primary and particular cases seen as generalization fodder, and an equally unacceptable legal nominalism which looks only to "fireside equities"[4] and dismisses legal rules as mere grounds for rationalization of decisions reached *ad hoc*. Conceptualist and nominalist theories of the decisional process are equally misdescriptive of the practice of justice as it goes on from day to day in the real world of courts, law enforcement agencies, and law offices. Each, the conceptualist and the nominalist, has hold of a part of the truth, but each asserts a profoundly false *either/or* relation between the demand of the general legal principle and the appeal of the concrete situation embodied in a particular controversy. For it is not *either/or* in the practice of justice. A legal order like ours is at once mindful of the values of consistency and predictability in the application of principles and sensitive to the variety, the intractable singularity, of the controversies that arise between men in society.

My emphasis, in the next part of this discussion, will be on the many ways in which the legal order, as it exists, manifests its sensitivity and responsiveness to the individual merits of particular cases. Do not infer from this emphasis that I am subscribing to the full nominalist thesis and forgetting the "law as rule" side of the binocular vision of justice. If I were forced, as I am not, to choose between the schools and become either a card-carrying nominalist or a card-carrying conceptualist, I would, I suppose, say that the nominalists are rather closer to legal reality, at least as it exists in trial courts and in law offices, than their rule-minded adversaries are, but that is not the explanation of my emphasis. My point is rather that the "scientific" view—rules as primary and cases as incidental and secondary—is vastly over-represented in the literature of jurisprudence and legal scholarship, and I hope to contribute towards some restoration of the balance by emphasizing, perhaps over-emphasizing, the aspect of case-mindedness and individualization in the practice of justice. A little skeptical nominalism is good for legal analysis, and long overdue. For, and this will be one conclusion of this Lecture, the exaltation of general rule over concrete case in formal professional discourse, in discussions of law and legal institutions by scholars in other fields, and in the understanding of citizens generally, has gravely undesirable consequences for law administration and law practice, and for law itself.

---

[3] FRANKFURTER, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 157 (1929).

[4] The late Karl N. Llewellyn drew a sharp distinction between "the relevant problem-situation *as a type*" and the "fireside equities" or "other possibly unique attributes of the case in hand." LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 268 (1960). (Emphasis added.) The term "fireside equities" is used as the equivalent of "the immediate equities of the controversy." *Id.* at 443.

II. THE WAYS AND MEANS OF INDIVIDUALIZATION

The "scientific" element in the practice of justice is related to the basic requirement that law's precepts be general in statement and application. Without generality in law, there would be no equality in the legal order, no impersonality or formal rationality in the operation of adjudicative institutions, no predictability in the planning of future conduct. "On the whole," wrote the late Edwin W. Patterson, "the generality of law is its most important characteristic."[5] Indeed, the idea of the legal precept as a measure, a norm, a general rule, is so deeply ingrained in our legal philosophy that most definitions of "law" list generality as an essential attribute and exclude the particular command, order or judgment.

Yet we know that there is another side to law's formal generality. To be general, a precept must be abstract, and the inclusiveness of any abstract formulation is achieved only by sacrificing something of concrete reality. We are mindful of Alfred North Whitehead's warning that "No code of verbal statement can ever exhaust the shifting background of presupposed fact,"[6] and of Justice Holmes' astringent observation that "General propositions do not decide concrete cases."[7] But the classic statement of this aspect of the problem of justice is much older and comes, curiously enough, from Aristotle, a thinker far more inclined in his general world view to universals than to singulars:

> Law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters therefore, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a

---

[5] PATTERSON, JURISPRUDENCE—MEN AND IDEAS OF THE LAW 97 (1953).

[6] WHITEHEAD, ADVENTURES OF IDEAS 71 (Mentor ed. 1933).

[7] Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion). Shortly before the *Lochner* decision, Holmes had written the following to his friend, Sir Frederick Pollock: "My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older. I always say that the chief end of man is to frame them and that no general proposition is worth a damn." 1 HOLMES-POLLOCK LETTERS 118 (Howe ed. 1941).

> wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. . . . This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.[8]

Aristotle's definition of the "equitable" is a prophetic and wonderfully apt description of the historic role of the English courts of chancery during the sixteenth and seventeenth centuries, when the common law, for a time, lost its traditional sensitivity to the merits of individual cases and became rigid and rule-bound. Equity has disappeared since then as a separate system of courts, but the idea of the equitable survives in full vitality and invigorates the common law judicial process. Consider, as a manifest example, the extent to which our law's central working policy, the doctrine of precedent, reflects this pervasive inclination to concrete and singular cases rather than to abstract and general rules. To say that a court follows the principle of *stare decisis* does not mean that it applies, in a mechanical and undiscriminating way, the general propositions of law stated in past judicial opinions. In the use of case-law precedents there is always room for necessary case-to-case individualization, always leeway for Aristotle's "rectification of law where law is defective because of its generality."

The common law doctrine of precedent is grossly misunderstood if seen only as a device for insuring certainty and generality in the application of established case-law principles. To be sure, it has that function: as a general matter, like cases are to be decided alike. But common law method is intractably case-minded, fully as sensitive to factual differences in cases as to their factual similarities. Rules stated in past judicial opinions are mere *dicta*—"persuasive" but not "controlling" as statements of legal principle—if they go beyond the material facts of the cases that were then before the court for decision. Yesterday's precedent is "binding" on the court in today's controversy only if the two cases involve the same material facts. And it is today's court, confronted with today's concrete and singular controversy, that determines what the material facts of yesterday's case were—and so whether yesterday's decision is a binding precedent for the disposition of today's controversy.

It is quite true, as exponents of one or another version of slot-machine jurisprudence enjoy pointing out, that flat overrulings are few and far between, except perhaps in the Supreme Court of the United States, where special considerations and special ground rules apply. A typical state court of last resort—the Supreme Court of Missouri or the Court of Appeals of New York—will, in the course of a working year, explicitly overrule at most two or three of its established case-precedents. But to stress this is to miss the point of the common law tradition. Out-and-out overruling of precedents is rarely necessary, because, in most situations, a just and sensible decision for today's case can be reached by distinguishing any embarrassing precedents away as somehow different in material facts from the concrete case now before the court. As this selective process continues over the years—this helpful precedent extended to justify sought results in new situations, that awkward one limited or distinguished away—we are likely to see the emergence of competing lines of precedent, so that a conscientious trial judge, called on to decide a close and difficult controversy, can decide that new case either way and support his chosen decision with all conventional legal proprieties.

---

[8] NICOMACHEAN ETHICS, Book 5, reprinted in MORRIS, THE GREAT LEGAL PHILOSOPHERS 25 (1959). The quotation is from the Rackham translation in the Loeb Classical Library. Compare the same text, in the Ross translation, in MCKEON, INTRODUCTION TO ARISTOTLE 421 (1947).

What I have said about the room for case-by-case individualization within the policy of *stare decisis* is not to be taken as a cynical account of the judicial process. To me, as I think to most lawyers, this flexibility and responsiveness to the particular merits of particular cases is the essential genius of the common law system. My present point is the narrower but, I think, more important one that the workings of our method of precedent exhibit dramatically the interplay of science and art, general rule and concrete case, in the practice of justice.

What does this mean for the work of counselors, advocates and judges in the world of law in action? All the implications could not be exhausted in a lecture ten times longer than this one, but a few should suffice for our present purposes. If the counselor is to make an accurate prediction of "what the courts will do in fact"[9] in a given problem situation, he must be as sensitive to the factual singularity and intrinsic equity of the concrete case on which his professional advice is sought as he is knowledgeable about the general "state of the law" embodied in the precedents. If the advocate is to make an effective presentation of a case committed to his charge, he cannot proceed, as too many do, by offering the court a formless and unfocussed collection of past judicial statements and holdings; what matters most is not past cases but *the case he has now,* and the factual merits of that case must shine through if his argument is ever to engage the serious attention of the court.

---

[9] "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS 173 (1920). *The Path of the Law,* the most influential piece of writing in the history of American jurisprudence, was originally delivered as an address to law students at Boston University and first published in 10 HARV. L. REV. 457 (1897).

To be sure, the judge presiding over any argument is doing his best to apply the law; he is bound by his judicial oath to do precisely that. But he wants, too, to reach a just result in the particular case before him. More often than not, if the judge gets proper assistance from counsel in a case, he can accomplish both of his sought objectives. There is no paradox in this; it is a consequence of our legal system's built-in responsiveness to the appeal of justice in concrete situations. In the binocular vision of justice, fidelity to general law and fairness in the disposition of particular cases are contrasting but not contradictory objectives.

Thus far I have been dealing almost exclusively with the realities of our common law method of precedent. *Stare decisis* is, after all, the distinctive policy of Anglo-American law and the one most often misunderstood by critics within and without the fraternity of legal scholarship. But I do not mean to suggest that the process of discriminating individualization is found uniquely in the use of case precedents as decisional sources. Established techniques of statutory construction in the federal and state courts reflect the same inclination to take due account of the particular facts of concrete cases, and there is as much room for responsible case-by-case individualization in the judicial application of statutes as in the decision of controversies by reference to case-law precedents.

To say this is not to affix a general endorsement to Bishop Hoadley's famous pronouncement, so often quoted by John Chipman Gray, that "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them."[10] Whatever the scope of judicial discretion, the judicial process in the interpretation of statutes is not as free-wheeling as all that! But there are ways and means, accepted and legitimate ones, of case-to-case "rectification" of statutory generality. If the words of a statute, read alone, point to what a court deems the fair result in a concrete case, the court can invoke the familiar plain meaning rule and refuse to go beyond the text of the statute. If the same statute, literally applied, would lead to an unjust result on the facts of the next case, the court is likely to take another look into its bag of clubs and pull out the equally respectable principle that statutes are to be applied not literally but in accordance with the intention of the legislature. If neither of these approaches accomplishes the sensible result, there is a whole armory of devices to be drawn on: canons of strict construction, presumptions against retroactive application, maxims like *ejusdem generis* and *expressio unius,* and many more.

---

[10] Gray uses the quotation three times in THE NATURE AND SOURCES OF THE LAW 102, 125, 172 (Beacon Press ed. 1963). Gray's views on the interpretation of statutes are sharply criticized as "atomistic" in FULLER, THE MORALITY OF LAW 84 (1964).

Orderly minded, scholarly critics are likely to find nothing but rampant confusion and inconsistency in the decisional literature of statutory construction. They should dig deeper, because much of the inconsistency vanishes, or takes on a different appearance, if we borrow a clue from Holmes[11] and address our inquiry not to "What rule of construction was employed by the court in this case?" but to "*Why* did the court in this case use this rule of construction rather than one of the others at hand?" Try this little exercise on the next ten cases you read that involve questions of statutory construction. I warrant that you will find, in at least nine of them, that the court chose the rule of construction it did because that was the one that led to a sensible and just decision in the concrete case at hand. In statutory cases, too, accurate prediction and effective counseling depend not only on the lawyer's understanding of what the statute says but also and equally on his sensitivity to and ability to convey the intrinsic merits of the case he has now.

Law's responsiveness to the variety and case-to-case singularity of the controversies that can arise between men in society finds expression not only in our accepted techniques for the use of legal sources but also, and perhaps more obviously, in the form of the sources themselves. Outsiders, even philosophers and social scientists who should know better, tend to think of the law as a body of quite specific rules, an aggregate of precise and narrowly worded propositions like "don't start until the light turns green," "a will is invalid unless witnessed by two persons," or "a bid at an auction sale is not an offer." There are many cut-and-dried directions like these: one finds them, for example, in real property, where certainty of record is a value of top-priority importance; in criminal law, where our tradition requires that explicit warning be given to possible offenders; and in income taxation, where the administrative efficiency of a mass-production operation is a dominant consideration. In most areas of the law, however, the crucial precepts are formulated in terms of far wider connotation. As Cardozo wrote almost fifty years ago: "We are tending more and more towards an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees."[12]

Thus in the law of contracts—a course I teach as everyone who ever took

---

[11] "You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? . . . Such matters really are battlegrounds . . . where the decision can do no more than embody the preference of a given body in a given time and place." HOLMES, *supra* note 9, at 181.

[12] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161 (1921).

Contracts from Tyrrell Williams must long to do—a right to restitution for a benefit conferred on another person exists "if as between the two persons it is unjust for the recipient to retain it,"[13] and an unbargained-for promise that has induced action by the promisee is binding on the promisor "if injustice can be avoided only by enforcement of the promise."[14] There is no tension here between the demand of general legal policy and the claim of justice in the concrete case; the legal principle itself incorporates individual justice as the governing test.

Broad standards like these are not unique to the law of contracts; indeed, contracts is a "reliance" area of law, and its precepts are probably less wide in formulation than in many other fields. The law of torts has its standard of the "reasonably prudent man," the law of trusts its sweeping concept of "fiduciary obligation," and constitutional law its standard of "due process of law" and others expressed in terms so broad that Learned Hand characterized them as "empty vessels into which [the judge] can pour nearly anything he will."[15]

The use of broadly formulated standards is not, we must note, a survival from more primitive stages of law's development but a phenomenon of law's maturity. As law becomes more sophisticated about the efficacy of detailed rules and more sensitive to the varieties of human controversy, less faith is put in narrow commands as instruments of justice and more faith in case-by-case discretion and judicial judgment. Roscoe Pound recorded this prevailing movement in legislative and judicial lawmaking in words that would be hard to improve on:

> [Standards] are general limits of permissible conduct to be applied according to the circumstances of each case. They are the chief reliance of modern law for individualization of application and are coming to be applied to conduct and conduct of enterprises over a very wide domain. . . . It may be said that in each case there is a rule (in the narrower sense) prescribing adherence to the standard and imposing consequences if the standard is not lived up to. This is true. But no definite, detailed state of facts is provided for. No definite pattern is laid down. No threat is attached to any defined situation. The significant thing is the standard, to be applied, not absolutely as in case of a rule, but in view of the facts of each case.[16]

---

[13] Restatement, Restitution § 1 and comment *c* (1937), summarized in Jones, Farnsworth & Young, Cases and Materials on Contracts 195 (1965).

[14] Restatement, Contracts § 90 (1932).

[15] *Sources of Tolerance*, address by Learned Hand, June 1930, in The Spirit of Liberty 81 (Dilliard ed. 1952).

[16] Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 485 (1933).

Statutes and case-law principles expressed in standards like these do more than authorize case-by-case judgment in the decisional process. They invite and command it, and, for the counselor, the advocate and the judge, everything turns again on the singular factual merits of the concrete case at hand.

Institutions for case-by-case individualization in the handling of concrete human controversies are encountered everywhere in the practice of justice. If we were not as preoccupied as we are with the idea of law as a body of rules, explicit commands, we would see these institutions for what they are and so be able to appraise them in terms of their actual, not their formal, function. The jury system, seen in this perspective, is far less a device for the finding of facts than an agency—perhaps, to be sure, an outmoded one—for individualization in the application of law. When a jury brings in a verdict that seems against the weight of the evidence, it is an incomplete explanation to say that it has made an erroneous finding of the facts. The jurymen may have known perfectly well what the out-of-court facts were but made their decision, against their instructions and in the teeth of the facts, because of their shared conviction that the essential justice of the case was with one party rather than the other.

Decisions like these, turning on the decision-maker's impression as to the essential justice of a matter, are made every day in the enforcement of the criminal law, and it is in prosecutors' offices, rather than in courts, that most of these decisions are arrived at. Shall an accused person be charged, and, if so, with how grave a crime? Shall he be given the opportunity to plead guilty to a lesser offense, or shall he be prosecuted for the most serious crime that the evidence will support? Twenty-five years ago, I had responsibility for the direction of a massive law enforcement program,[17] and I have believed ever since that the discretion of the prosecutor is the most important single element in a state's criminal law. The Model Penal Code prepared under the leadership of my colleague, Herbert Wechsler, is a towering achievement in legal scholarship and law reform, but I rejoice equally in the growing increase of our knowledge, to which Professor Miller and Professor Gerard of this law faculty have made substantial contributions, concerning the ways in which police officials and prosecuting officers exercise their discretion and inevitable dispensing power in the individualization of criminal prosecution and punishment.[18]

---

[17] Director of Food Enforcement, Office of Price Administration.

[18] LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965) is the first of a series of monographs on the administration of criminal justice in the United States being brought out by the American Bar Foundation under the general editorship of Professor Frank J. Remington. The volume on prosecution for this important series

On an occasion like this one, I could not possibly undertake a complete and encyclopedic inventory of the agencies of individualization that abound in our legal order. It must be noted, however, that the task of case-by-case individualization is performed not only by judges and other public ministers of the law but also by practicing lawyers. The lawyer's distinctive art, adaptation of law's general rules to the merits and necessities of concrete situations, is called for at every stage of the profession's work: in the drafting of wills, agreements, and other documents, in the structuring of transactions, in the arbitration of disputes, and in the negotiation and arrangement of out-of-court settlements.

Anyone with a little legal training can consult the law books and tell a client what he cannot do. The lawyer—the honest-to-God lawyer—has the imagination and intellectual resourcefulness necessary to tell his client *how* he can do, legally and fairly, the things that a concrete situation requires be done. This necessitates not only knowledge of the state of the law but also—and this is far harder—deep and perceptive understanding of what I have been calling "the case you have now." In the lawyer's office, as in the courtroom, there is need for a binocular vision that is, at once, mindful of the demands of the general rule and sensitive to the merits and necessities of the concrete situation.

III. LEGAL REALITY: THE NEED FOR CANDOR

"A *case,* not an exercise in algebra!" Why have I made this the essential theme of today's lecture? One reason, and a sufficient one, is that it is something I learned from my great teacher, Tyrrell Williams. The other and closely related reason is that I consider it the most important single thing that can be said to law students, or to scholars in any field who want to have a grasp of legal reality.

We are always hearing about a supposed "gap between law school and law practice." This, I suggest, is not a matter of knowing where the clerk's office is or how to prepare an affidavit. Law graduates are brighter than they were in my day, and they catch on to workaday details with astonishing ease and speed. The true gap is that students—and here they are like scholars in any field—leave law school almost too well informed about general legal principles and insufficiently aware of law's pervasive occasions for case-by-case individualization. A few years practice of the lawyer's art corrects this imbalance in most instances, but it is a gap that many lawyers never manage to get across, to the lasting damage of their professional ca-

---

is being written by Professor Frank W. Miller of the Washington University School of Law.

reers and the profound disservice of their unhappy clients.

In university legal education, it is the case method of instruction on which we rely to give our students an awareness of the continuing interplay of legal science and the lawyer's art.[19] The founder of the case method, Christopher Columbus Langdell, built better than he knew. We have abandoned Dean Langdell's notion of the case method as a "scientific" procedure, but we have retained it as the way to develop the qualities of what we like to call the "legal mind": precision in the understanding and statement of facts, distrust of easy generalizations, and capacity for original and constructive thought.

There is need for a continuing rear-guard action to maintain the integrity of the law school case method. We law teachers are too much inclined toward the use of cases not as exercises in the practice of the lawyer's art but as mere illustrations of general rules and principles. With the vast extension of government regulation and the proliferation of legal materials, we are under increasing pressures to cover more ground, offer more courses, give law students more and more legal information. Like our brothers of the judiciary and the practicing bar, we academic lawyers are unduly preoccupied with the appellate courts—where the distinctive task is that of clarifying the general law—and give insufficient attention to the trial courts, where the task of fair individual decision is central. At the risk of sounding like the Ancient Mariner, I would have us stand by the case method. It is a painfully slow way of covering substantive ground, but it is the best device I know for communicating the realities of the binocular vision of justice.

When one moves outside the universe of the law schools and the legal profession, he becomes conscious of other damage done by the undue concentration of our professional discourse on law as general rule. Social scientists are becoming more interested in legal institutions and far more willing than they used to be to work in collaboration with lawyers for better understanding and practical improvement of the legal order. But, by and large, the scholarly and pragmatic value of the work done so far in law-related fields by sociologists, economists, social psychologists, political scientists and others has been gravely reduced by their failure to apprehend the primacy of the case in the practice of justice. It is painful to see how a social scientist, wonderfully sophisticated in his own field, can adopt a slot machine theory of justice and remain oblivious to the occasions for case-to-case discretion that characterize present-day American law.

---

[19] See Jones, *Objectives and Insights in University Legal Education*, 11 OHIO ST. L. J. 4, 5-7 (1950), Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL ED. 1 (1951).

But there are even more serious consequences. Widespread public misapprehensions concerning the realities of law in action have contributed almost everywhere to a serious underrating of the importance of judicial personnel and judicial selection.[20] The Missouri Plan of merit selection of judges is, I am confident, the wave of the future, but it is not state-wide even in Missouri, and it is a long way off in most jurisdictions. We will not have a sound system of judicial selection throughout the United States until informed citizens generally are made conscious of the interplay of law as science and law as art in the administration of justice.

Too many people, unaware that law has its aspect of discriminating individualization as well as its aspect of generality, conclude that it makes little difference who occupies the bench. Assuming elementary probity, they ask, will not any two judges decide a case the same way? Other laymen, a bit better informed, but not much, make the frightful assumption that a lawyer is best qualified to be a judge if he is a walking encyclopedia of legal rules and principles. I hardly need to add that everything I have just said applies equally to the selection of district attorneys and other prosecuting officials. If, as I believe, the most important thing about a jurisdiction's criminal law is who its district attorney is, it is urgent that citizens generally be made aware of the fact that prosecuting attorneys, informally, and largely on their impressions of offenses and offenders, decide the fate of far more accused persons than ever appear in the courts for trial.

But I would not rest my case entirely on pragmatic considerations. The rule of law is central to our society, and it should be known, discussed and venerated for what it is. Public awareness of the binocular vision of justice will not, as the conceptualists fear, reduce respect for legal institutions. For there is surely nothing discreditable about a legal order that pursues, at once, the goal of equality before the law and the contrasting but not, in our system, contradictory goal of justice in the individual case.

---

[20] Winters & Allard, *Judicial Selection and Tenure in the United States* in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 147 (Jones ed. 1965).

TOWARD THE HUMANISTIC STUDY OF LAW

CHARLES A. REICH†

LAW schools are in trouble with their students. They are not able to interest, inspire, or even hold on to many of their best college graduates. It is true that for most students the first year is exciting. The fresh incisiveness of approach, the active classroom, the impatience with fuzzy college ways are a great experience. But after the first year the excitement fades. Students cannot find courses they want to take. Having caught on to the classroom method, they drowse through increasingly obvious repetitions. They try to find new interest outside the classroom in legal aid, practice trials or law journal work. All too often law school ends with students merely marking time.

Law schools are also no longer attracting as many of the best and most imaginative college graduates. College students today value the intellectual life more than their predecessors. They like courses which are searching and speculative; law seems to them to require a narrow confinement of the intellect. College graduates are increasingly idealistic, and increasingly skeptical about the commercial society in which they have grown up. They regard the legal profession as an adjunct of business, and lawyers as hired special pleaders for the established values. Moreover, students reject a role as a gun for hire — a secondary being. Many come to law school with no real intention of practicing law, hoping that they can find a career in public service or teaching; some of the top students will not even interview the large firms.

Doubt and self-criticism are certainly not new to the law schools. But the doubt and self-criticism have not been deep enough, and the many attempts at reform have not succeeded. Law schools must keep seeking new answers, or see their position of leadership gradually lost.

I

Many of the ills of legal education are symptomatic of the fact that it is primarily professional in orientation, although it should also be preparing students for lives of public service and scholarship. This confusion of goals is tacitly recognized, and an appearance of unity is maintained by the theory that all three are accomplished by the law schools' special way of training the mind. But the unity rings false, and the schools do not accomplish all that they undertake.

The most important aspect of training for practice is methodology and approach. When the practitioner confronts a new problem, he rarely depends upon what he learned in law school. Subjects are too specialized and technical, too rapidly changing. The practitioner prides himself on his ability to become familiar with any area of law, no matter how new to him, in the course of working on a single case. His stock in trade consists of the ability to analyze and organize facts, the ability to communicate, argue and explain, knowledge of research and writing methods, and a free-wheeling mind. After about one year, the law school has done almost all it can to equip the student in this style; the rest must be learned on the job. If the courses are to be of any value, they must offer something different.

---

†Professor of Law, Yale University.

But the courses in law school, although superbly adapted to the teaching of methodology, are far less effective when they try to accomplish other goals. In the first place, the materials of most courses — opinions of appellate courts — are well suited to logical analysis but inevitably have little depth or variety of outlook. Second, where modern casebooks have attempted to introduce materials from other disciplines, they have done so at a level that is so elementary and piecemeal that it has little value. Casebook social science usually consists of truncated excerpts from secondary sources, inserted into the notes in small type. Even where a law school offers courses dealing expressly with the social sciences and taught by experts in the field, the courses may turn out to be elementary at best. Third, the law school curriculum requires the student to consider a large number of complex issues in such haste that the result can only be superficial. Sixteen weeks of constitutional law allots only a few hours each to such immense questions as the limits of national power, federalism, the political role of courts, and the many problems of individual liberty. At best, such courses merely alert the practitioner to "where the issues are." Fourth, almost all these courses deal with their subjects at the same intellectual level of inquiry.

Law schools do little to encourage students to use initiative in educating themselves. Students are not really treated as adults. They are made to feel that they are beginning their education all over again, and the classes put very little emphasis upon individual work and thinking. The students get caught up in examinations, grades, and class ranking. In many ways the LL.B. program is undergraduate, not graduate education.

Even when law schools undertake to grant advanced degrees, the educational program remains at much the same level. Certainly there is no graduate training in law in the same sense that there is in the social sciences. Graduate degrees in law do not have the status of graduate degrees in other fields. The major law schools hire men for their own faculties without any concern for whether they have had graduate training in law, and a large number of the most respected professors of law have only a bachelor's degree.

In sum, despite many reforms, in spite of the language of expansive law school catalogues, in spite of widespread recognition of the need for further change, law school education in fact continues to reflect primarily the needs of the profession as the profession is now constituted. When these needs are met, there is little to hold even the professionally minded student. For the more uncommitted student, law school's procession of torts, contracts and procedure passes with little meaning.

II

What can the law schools do? I believe that their failure is primarily the result of the fact that they do not teach law as a subject matter. In other areas of graduate education, methodology is kept secondary to the subject matter itself. This is the law schools' missed opportunity. The underlying subject matter of law is as interesting and intellectually exciting as any branch of human knowledge. Legal institutions are among the most primitive and basic in any society. Law deals with human beings in their moments of greatest stress and in their most profound conflicts with each other and with society. The study of such institutions, and such questions, could have endless challenge. Surely the law schools can try to teach at least a few of their courses in this way.

In property, for example, a great question concerns the nature and functions of the concept or institution called ownership. This question is present, if not always articulated, in the discussion of the chief topics with which the course in property is now concerned: how much one person can limit another's rights of ownership by private volition; how much ownership can be split between different persons such as landlord and tenant; to what extent the state may take ownership for public use, and with what compensation; and what forms of wealth should be accorded legal protection as private property. If property were studied in depth, the problem of ownership would lead to a series of truly searching questions. What does "ownership" mean in our society? Ownership consists of a varying bundle of elements, and the problem is which of these go to the core of ownership, and which are only peripheral. What functions does the concept of "ownership" perform, and what values does it embody? Ownership can protect such diverse values as privacy, individual decision making, differences in taste, family succession, social status and pluralism in the political sense. Where should the line between the individual owner and the state be drawn, not in terms of vague constitutional formulas, but in terms of the underlying values at stake? It would be necessary to know the impact of the legal institution of "ownership" on individual human beings, and on society. Finally, how is the institution of property and ownership changing, and how ought it to change?

The study of ownership would necessarily have to draw on many fields. Among these might be anthropology, history — particularly the history of the institution of property, philosophy in general and political philosophy in particular, the ownership systems of other countries, social science information about the effects of ownership and non-ownership on character and behavior. The psychology of property would furnish both an explanation and a critique of much law; what men try to own and why; what needs they seek to satisfy through property; how these drives shape those who are possessed by them. Finally, in studying ownership students would encounter what is now regrettably omitted from most law schools: the richness, complexity, and imaginativeness of the common law, set in its historical background, with close attention to the infinite artistry of its detail. Such a course need not and should not become the watered down study of philosophy or history or social science. The focus and object of study would remain questions that are uniquely legal. But it would be law in greater depth, intensity and excitement.

A second course which needs greater depth is criminal law. Criminal law presents profound issues. How is blame to be divided between the person who commits an act and the persons and environment which laid the groundwork for the act? What is the meaning of free choice in light of the objectives of the criminal law and the knowledge supplied by psychiatry? Where shall "objective" standards of responsibility be set in terms of ability to resist temptation, ability to foresee risks, or ability to control the behavior of others? Such issues have long been the subject of intense thought and debate by philosophers, and in many ways their thinking about these problems is more advanced and sophisticated than that of lawyers. The basic issues of the criminal law are also treated with much insight in many works of literature. One could profitably read such diverse authors as Hawthorne, Melville, Dreiser, Kafka, Camus and Dostoyevsky, to say nothing of Shakespeare and the Bible, for their many different ways of looking at the law. Sartre's play "The Flies" is a more searching study of responsibility than any of the cases I have read. Criminal law is an area where the blackletter is relatively straightforward and easy, but the problems involved in the creation of standards are profound. This is a job which our society has assigned to lawyers. Philosophy and literature would aid the student lawyer to develop some part of the understanding needed for this almost superhuman task.

It hardly needs mention that criminal law also requires the insights of psychiatry and psychoanalysis. To a large extent law and psychiatry have talked past each other despite the growth of sophistication in both disciplines. In the sense of genuine communication, psychiatry and criminal law is still an untouched field.

Administrative law is a subject which is utterly unintelligible, even in the most narrowly "legal" terms, unless the student is able to see more than the cases. Agencies, and cases concerning them, are inseparable from history. Much legal doctrine can be judged only in economic terms. More important still, the whole object of the administrative process is to perform the vital and complex work (common to both the modern democratic and the socialist state) of planning and allocation. Our administrative agencies are our chief instruments of domestic social policy, more important even than Congress, and our chief distributors of wealth from public sources. When an agency decides where a highway is to be located, who shall be licensed to broadcast over a television channel, or whether a dam shall be built across a river, it is engaging in planning and allocation of major importance. In a democratic country, it is vital that all affected persons be heard, that all points of view be aired, that all competing interests be considered. How to accomplish this, and still get decisions made, is the great dilemma of planning and allocation. Unless this underlying process is studied in its own right, the judicial and agency opinions can only be wordy and baffling collections of formulas and criteria, signifying nothing.

If the curriculum were revised to permit study of the subject matter of law in greater depth, a school could offer several courses of unusual length and intensity — perhaps a two semester, ten hour course in property or criminal law. Readings would have to go far beyond casebooks. In part law schools stick to cases because the classroom method developed from cases is so effective; but that very effectiveness has now become a source of dependence and limitation. Ways must be found to be effective with other kinds of materials. Departure from cases would also mean that students would be compelled to do more original thinking. In the classroom they might be invited to criticize and contribute to the instructor's own ideas. On their own they might be asked to write papers requiring individual originality, rather than take examinations. Two short papers, each on a particular problem, would be far more worthwhile for student and professor than several standardized answers multiplied by fifty.

To teach such courses, law professors would need a broader education than most of them now have — not just a law degree plus a few years in practice, but some graduate study in the arts and sciences, or perhaps a new type of graduate course in law. An increasing number of young teachers are now seeking a broader education. Pending the millennium when such education is general on faculties, law schools could continue to appoint to their faculties scholars in fields other than law, and to permit students to take a wide variety of relevant courses in other branches of the university.

III

Law school education cannot exist for its own sake. It is not possible to talk about innovations in legal education without talking about them in relation to lawyers' work. And it is when we consider the changing nature of the legal profession that the real need for educational change becomes apparent.

The study of law in greater depth could, of course, be justified by even the narrowest view of the profession. It could be justified merely as a way to maintain interest during the second and third years which are now so barren. It could be justified as offering the practitioner greater insights and a wider ranging mind, without loss of anything now found in law school. It could be justified in terms of preparing teachers and scholars. And it would be particularly helpful in terms of lawyers going into public service. Government policy-makers trained as lawyers are susceptible to becoming trapped in their own logic. They may operate wholly from within a logical system the basis of which (quite possibly mistaken) they do not question. And lawyers tend to be know-it-alls who believe no other branch of human knowledge is beyond their grasp. Men who "think like lawyers" can rigidify the operations and the thinking of government. Education which teaches the lawyer tight logic but then gives him enough spaciousness to free himself of that logic would in the long run greatly benefit a government dependent on lawyers to run its affairs.

But the most important reason for a new approach to the study of law is not simply to improve the present job of educating scholars, public servants, and practitioners as that job is now conceived. The ultimate justification for curricular revision, or rather the necessity, comes from the fact that the role of law in society has changed and is changing, and hence the role of lawyers must change.

Law now permeates every activity. This trend is inevitable as society rapidly becomes more institutional and bureaucratic. Today's social problems necessarily become legal problems. Thus, poverty is primarily a legal problem, since in a country of great wealth it is a problem of distribution, not a problem of producing more goods.

As a result of these changes, law in recent years has been called upon to serve many new causes. The civil rights movement used law as its primary instrument in a drive for fundamental social change. Many other groups concerned with protest or change have adapted civil rights techniques to their own objectives. The nation's awareness of the problems of poverty has revealed a need for lawyers in many new areas: defense of indigent criminals, protection of the poor in their dealings with private individuals (notably landlords), and assistance to the poor in confronting government (social welfare, public housing, education). The growth of governmental activity in economic affairs has brought law into many new areas of business and individual activity, and lawyers caught in the toils of the administrative process recognize the urgent need for a fresh approach to this unmanageable area.

Until very recently, the legal profession has narrowly limited its scope. Lawyers have traditionally concerned themselves with only one sector of the world in which law now operates, the sector of commerce. For most of them, day-to-day law has meant business law. Other problems have clustered around the business core, but these have also tended to be commercial in nature. Today, however, it is vitally necessary that lawyers actively participate in all of the areas of society in which law now plays a role. Their work may start with business, but it should range over criminal law, public housing, social welfare, unemployment, problems of the mentally ill, urban town and country planning, economic planning both local and national, civil rights, civil liberties, all forms of protest movements, and international law. In their private capacity they should be available to help all those individuals and groups who come in contact with law. They should learn to represent the various interest groups, constituencies and minorities in society — to help them develop points of view, speak for them, and interpret the world to them. That is the true scope of the practicing lawyer's calling.

In his public capacity, the lawyer's responsibilities are even greater. Every year government gets more vast and complex tasks to perform, and every year the government seems less able to cope with them. There are experienced men in the bureaucracy who believe that one day government will simply stop running altogether. That is almost what has happened with respect to decisions concerning television, dams, airline routes and highways. No profession has emerged to manage the affairs of government, which still remains the last great playground for amateurs, part timers and fortune seekers. Only lawyers can be the professionals of public life.

Moreover, policy making for public affairs must take on a new character. Most of our planning and policy making has been of the ad hoc, hand to mouth, empirical variety so congenial to lawyers. This has not been good enough. Planning must be based on a broader, more speculative philosophy, and keyed to longer range goals. Ultimately the role of the public lawyer must change very basically, so that he engages in a type of intellectual work far different from his usual day to day activism. It is for this that legal education must now equip him.

It is important to recognize explicitly that whether he is engaged publicly or privately, the lawyer will no longer be serving merely as the spokesman for others. As the law becomes more and more a determinative force in public and private affairs, the lawyer must carry the responsibility of his specialized knowledge, and formulate ideas as well as advocate them. In a society where law is a primary force, the lawyer must be a primary, not a secondary, being.

All of this leads to the law schools' greatest responsibility and opportunity. Today we lack — and desperately need — a profession concerned with the overall structuring of society. Where most areas, even philosophy and the social sciences, have become increasingly specialized, students of law have, of necessity, remained generalists. This is so because law touches all areas of life, and because it touches life in a prescriptive sense — by the setting of standards — and thus it unavoidably treats of society as it ought to be. Hence the study of law as a subject matter must be a study of society in the moral sense of ought and should. Herein lies law's true kinship with literature and with the other arts which seek a critique and an overview of society. Herein lies law's responsibility to be, not merely in apostrophe but in reality, the queen of the humanities.

Today's youth have high ideals for themselves and for their country. Their vision of a good life includes the life of the mind and the senses; it includes service to the oppressed and the disinherited; it includes a deep and abiding humanism.

Perhaps those idealistic students who now shun law schools and the legal profession are quite right; they would find little place for themselves in the present day profession. And it is not the object of this article to lead them to think otherwise. Change will be very slow in coming, and probably will not occur in time to offer careers to students now in college.

But ultimately the law does offer, more than any other way of life, what they are looking for. With only their idealism the new generation can have little impact. Law can arm them. Through law they can aid in the constant reform and adaptation of society. Through law they can help to keep impersonal organization from overwhelming the basic human values. And in law they can find a life that is richly creative. Law can be the intellect and the sword of this new generation, and through them, more than ever before, the servant of man.

Explanatory Note

The following Readings have been selected for their pertinancy to the "highlight topics" selected for consideration during the Clinic's third and final week. Attention continues on problems in legal education but with emphasis shifting from the central teaching-learning process to related aspects of law-teacher involvement in the total educational operation.

ACKNOWLEDGMENTS

For the materials that follow, grateful acknowledgment is made, in the order of their presentation, for permission to provide them for Clinic use.

Cavers, Legal Education in Two Calendar Years - A Revisitation. Especially prepared for the purpose indicated and furnished the Clinic through the courtesy of Professor David F. Cavers, now President of the Council on Law-Related Studies.

Kinoy, The Present Crisis in American Legal Education. 24 RUTGERS LAW REVIEW 1 (1969). Reprinted by permission of the Rutgers Law Review and of Professor Kinoy.

Ball, "Objective" Questions in Law Examinations. 12 JOURNAL OF LEGAL EDUCATION 567 (1960). Reprinted through arrangement with the Journal. Professor John Murray, Editor.

Hurst, The Law in United States History. 106 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 518 (1960). Reproduced by permission of the Society and with the author's approval.

Rosenberg, Quantitative Methods for Judges, Lawyers, and Law Teachers. COMMUNICATION SCIENCES AND LAW 171 (1965). Reprinted by permission of the Bobbs-Merrill Company, Inc., and with the approval of the author.

Oberer, Gorman and Goldman, Amicus Brief of the Association of American Law Schools (1971). Reproduced through arrangement with the Office of the Executive Director of the Association.

Levi, Law Schools and the Universities. 17 JOURNAL OF LEGAL EDUCATION 243 (1965). Reprinted through arrangement with the Journal. Professor John Murray, Editor.

Fuller and Randall, Professional Responsibility: Report of the Joint Conference. PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS 187 (1958). Reproduced through arrangement with the Office of the Executive Director of the Association.

McPherson, The Black Law Student. THE ATLANTIC for April, 1970. Copyright © 1970, by The Atlantic Monthly Company, Boston, Massachusetts. Reprinted by permission. The author's permission has also been given.

May 11, 1971

TO: Participants in the Conference on Legal Education to be conducted by the AALS Curriculum Study Project.

The attached article (in draft) is a sequel to an article of mine in the A. B. A. J. for May, 1963. When I brought my plan to return to its subject to Paul Carrington's attention, he generously offered to distribute it to the conferees at the May 31st meeting. However, though he has supplied your names, I have assumed the onus of thus intruding my notions upon you. D. F. C.

Legal Education in Two Calendar Years - A Revisitation

David F. Cavers
Harvard Law School

American law schools are confronted today by sharply rising enrollments and a still more sharply increasing volume of applicants whose number now greatly exceeds the number of student spaces the schools admit to having available. At the same time, we are witnessing a serious falling off in student satisfaction with law study.[1] That second-year slump now comes in the wake of first-year disenchantment. Third-year apathy is growing into alienation, exacerbated by new anxieties. Complicating these conditions is the circumstance that both law schools (or their universities) and law students are pinched by the combination of economic recession and price inflation.

These conditions are leading some legal educators to consider a drastic solution: a reduction of the law curriculum from three years to two. Proposals to this end are sometimes accompanied by optimistic predictions that the new time span--four conventional semesters--will yield at least as adequate educational results as have the traditional six semesters in three years. These predictions rest on the projected introduction of a variety of educational innovations, including a number that are still in the gleam-in-the-eye, pre-experimental stage.

As one who has long advocated departures from traditional patterns of legal education, I favor educational experimentation, and many of the experiments now under consideration are appealing even though their effectiveness as short-cuts may be questionable. However, an experiment is designed to establish the feasibility or desirability of a change on the basis of the experiment's results. I question the wisdom of making the change-over concurrently with the experiments.

Suppose the experiments were to demonstrate that the happy results the experimenters envisage could not be obtained. Then would come pressure to return to tried-and-true teaching techniques while still keeping within the four-semester time-frame. The result could be a cut-and-dried, bread-and-butter, preparation-for-the-bar-exam law curriculum. Abandoned would be efforts to equip tomorrow's lawyer to meet the multiplying, diversifying demands of today's society and the society of the Twenty-First Century which 1971's law graduates will encounter as they reach their professional prime.

---

[1] I doubt this is endemic nationally, but I suspect that disaffection will spread and that our institutional complacency has gone the way of Humpty Dumpty.

Confronting this hazard, I would counsel law schools to preserve their six-semester law curriculum until at least the development of new pedagogical practices and materials has proved that less instructional time is needed to achieve the goals that we have come to recognize as important. Experimentation may provide this demonstration, but for this purpose more is needed than an occasional achievement by a particular instructor or, indeed, success in a particular course or even law school. Recalling how past innovations in legal education have eroded steadily into substantial conformity with past practice, I should be surprised to see major changes in law school practices solidly established within a decade, even after account is taken of the new pressures created by student agitation for bold departures.

I.

I am moved to accompany this counsel by urging the consideration of a proposal I put forward in 1963 with express awareness that its time had not yet come.[2] This proposal would preserve the present dimensions of the law curriculum--six semesters--but compress them into a period of not quite two calendar years. (To distinguish semesters thus treated from the conventional semester, I shall call the former "trimesters".) This proposal calls for no substantive educational innovations though I think it would provide a propitious framework within which a number could be launched. It would, moreover, minister to a number of problems that law schools and their students currently face.

1. The two-calendar-year plan would enable law schools now restricted in their admissions by limitations of space to enlarge their first-year classes by nearly 50% without having more students in residence after so doing than they now have.[3] This would seldom require a corresponding increase in the size of the school's faculty; sometimes, none would be needed. The gain in tuition income for those schools that rely on it could be substantial.

2. The plan would enable a law school to increase the amount of the individual teacher's class instruction by 25% over a two-year period, while not reducing the total time within that

---

[2] Cavers, A Proposal: Legal Education in Two Calendar Years, 49 A. B. A. J. 475 (May, 1963).

[3] The critical point would be the Fall Trimester of the second year when the second enlarged class would be on the premises concurrently with the first enlarged class, the latter having reached the fourth trimester after some attrition.

period which that instructor would have free from teaching. Moreover, schools not under pressure to reduce instructional costs could allow their faculties greater freedom for research than the present system permits. A marked increase in time free from instructional duties each year would be possible without additional expense.

3. The law student would escape the stretch-out that he now experiences as a result of having to invest 33 months of his life to secure 27 months of instruction.

4. The loss of summer earnings by the student fortunate to be employed at a high salary in the summer following his second year would be far more than offset by his ability to enter the profession almost a full year earlier, having escaped, moreover, the living costs (though not the tuition charges) of the third academic year.4/

5. For the law student who desired a period of law office work during his law course, the possibility should be open under the two-year plan for him to defer the fourth trimester, taking that trimester's work the following year, thereby completing his legal education by the Christmas recess of that (third) year. If a law student wished to enter a combined course in another school or department in his university (as some law schools are now permitting), he should be free to interrupt his law course for a year after the third semester and pursue his studies in whatever school or department the program embraced. At the end of the third trimester, he would have completed half his law course, and so would have added to the knowledge acquired in the traditional first-year courses the learning in such courses as, say, Constitutional Law, Corporations, and Taxation. He would have a sufficiently broad foundation in law on which to build in office work or the combined program.5/

6. Without attempting to demonstrate the proposition, since the possible variables are innumerable, I submit that two blocks lasting three trimesters each permit a more effective organization of time for instruction than do the present three blocks of two semesters each. As I noted in my previous article, each three-trimester period could be "built around a central theme: the first three trimesters toward the understanding of legal fundamentals--doctrine, institutions and processes; the second three trimesters, toward application in contexts calling for the interrelation of different bodies of law and resort to different lawyers' operations."6/

4/ Some comparisons of the financial effects of the two plans appear at the end of this article.

5/ This assumes that one-trimester courses in the fields noted would be offered in the third trimester. This seems to me both feasible and desirable.

6/ Cavers, *supra* note 2, at 479.

Needless to say, a clinical trimester could be fitted into the pattern for those schools that have found this to be useful. In those schools that stress the importance of a substantial student research product, spreading this over the three-trimester span would be preferable to fitting it into two semesters.

II.

How could all these wonders be brought about? First, and very important, only one class should be admitted in a single calendar year. The admission of new classes two or three times a year necessitates the repetition of required courses and may result in a school that is crowded and pressurized.[7] If this temptation is resisted and a single class is admitted, then only two classes would be in residence at the law school at any one time. The table below indicates how this schedule works out. As a result, space need be provided for only two classes in any one trimester. Whether more teachers would be needed as a result of increased numbers would depend chiefly on whether more sections would be required and the extent to which the school emphasized small classes and seminars. A school with 90 students in each section might move to, say, 120 or 130 without increasing its faculty.

Trimester	Class of 1973	Class of 1974	Class of 1975
1972 Fall Trimester	4th Tr.	1st Tr.	
1973 Winter Trimester	5th Tr.	2d Tr.	
1973 Spring Trimester	6th Tr.	3d Tr.	
(6 Weeks' Summer Recess)	Graduation		
1973 Fall Trimester		4th Tr.	1st Tr.
1974 Winter Trimester		5th Tr.	2d Tr.
1974 Spring Trimester		6th Tr. Graduation	3d Tr.

In my 1963 article, I constructed three possible schedules, allowing for a six-week summer vacation and ample recesses at Christmas time and between the Winter and Spring semesters. The shortest time available for classes under the schedules came to a total of 72 weeks for the entire course. Variations permitted an increase from 72 to 75 or as many as 78 weeks of instruction.

Departing in minor respects from the 1963 schedules, I have constructed a new one allowing 14 weeks for each trimester, of which two weeks could be devoted to examinations (for which classes might be substituted at the end of the first trimester), leaving 12 weeks for classes in each trimester for a 72-week total. The schedule would exert some pressure to reduce the time devoted to examinations, a reform that merited support even before these days of "pass-fail". Class time could be extended to 75 or 76 weeks by such a reduction.

---

[7] I do not consider programs organized on this basis as exemplifying my proposal. Certainly those of us who remember the post-war "accelerated programs," admitting three classes a year, do not wish to renew that experience.

My illustrative schedule follows:

1972

Sept. 11.	1st & 4th Trimesters begin.
Dec. 16.	1st & 4th Trimesters end.
Dec. 17-Jan. 7	Christmas recess.

1973

Jan 8.	2d & 5th Trimesters begin.
April 14	2d & 5th Trimesters end.
April 8-22	Spring recess.
April 23	3d & 6th Trimesters begin.
July 28	3d & 6th Trimesters end.
July 28-Sept. 9	Summer Vacation.
Sept. 10	*Da capo*.

If we assume that the typical semester in American law schools today provides 15 weeks of instructional time, the present three-year course of instruction would total 90 weeks over the six semesters. Why does not a 72-week program present a drastic reduction in instructional time from the present 90-week total?

The two-calendar-year plan does not entail such a reduction, nor does it require an increase in the number of classes meeting each week. In my judgment, 14 classes represent a good weekly class load, and it would be maintained under the schedule I propose. However, I would have each class run for an aggregate of 60 minutes instead of the customary 50-minute "hour". This change adds 20% to the instructional time--20% net, with no time lost by the disturbances and distractions incident to starting and ending a class.

In my 1963 article, I argued at considerable length--persuading myself completely--that the burden imposed by increasing the duration of each class by 10 minutes would be very tolerable, far less than the increased burden resulting from a comparable increase in the number of class hours. For both teacher and student the 60-minute hour seems satisfactory at those law schools which already use it, Pennsylvania, for example. I understand that a teacher new to the schedule has to resist the temptation to proceed at a slower rate than usual, but this presumably is a transitional weakness that most can overcome.8/

8/ Another complaint is that classes do not all start at the same point in the hour. Ho-hum. More consequential is the fact that, if the law school's hours differ from the college's, cross-registration is impeded. Planning can reduce but will not eliminate this difficulty. Would a four-semester plan permit any cross-registration whatever?

When the number of minutes of instruction is compared, 72 weeks of 60-minute classes result in only 4% fewer minutes of instruction than do 90 weeks of 50-minute classes, and a 75-week schedule yields exactly the same number. I emphasize this similarity and identity in total instructional time not to stress the importance of the close correspondence but to rebut the natural reaction that a 72-week program must be a much smaller instructional vehicle than one that runs for 90 weeks. Many law professors who, like myself, would hesitate to cut the law course from three to two years today view instructional time less jealously than they once did. Witness the greater freedom accorded law students to take courses outside the law school and the liberal allowances of course credit for clinical work.

The two-calendar-year plan does impose substantial pressure for reducing courses from two semesters to one trimester, a development I think desirable quite apart from its facilitation of the plan. Probably the ordinary trimester course schedule would include a number of courses meeting four times each week. The course meeting four times each week for 60-minute hours in a 12-week trimester would provide almost as much instructional time as a course meeting twice a week for two 15-week semesters. The shortfall would amount to 120 minutes--de minimis, I submit.

III.

Especially important are the potentialities of the two-calendar-year plan for the enlargement of the research contribution of law faculties. That contribution has not been impressive if we except the flow of commentary on judicial decisions, a flow that continues, though perhaps in somewhat abated volume. Studies entailing field research have not been flourishing, despite the greater lip-service accorded their importance, perhaps in part because typically they require more time free from class obligations than law school programs have afforded.

Instructional demands on law faculties are now increasing. Faculties are responding to pressures for smaller classes and for more individually supervised work. They are also involved in continuing dialogues with students seeking to improve the state of legal education or of society. These developments, better suited to academic institutions staffed on the graduate school model, may be intrinsically desirable, but they exact a price in professional time and in physical and psychic energy that leaves few reserves for scholarly reflection, research, and creativity--or even activism.

It is significant that in England, where the tutorial mode of instruction imposes heavy demands on the individual teacher, the three terms of instruction total 24 weeks in the year. This would be all that would be required of those faculty members in schools adopting a two-calendar-year law curriculum which required their faculty to continue to teach only two semesters (trimesters) each year.

In addition to six weeks of summer vacation and four weeks of recess during the school year, these teachers would have a block of fourteen weeks free from instructional duties 9/ other than whatever bluebook reading they had not completed during the preceding trimester, a load that can and should be diminished. Present schedules give law teachers thirteen or fourteen weeks in the summer after bluebooks are in, from which a vacation period must be subtracted. The period left free from classes is not only shorter than the two-year plan would permit but must always come at a time of year when the operation of legal institutions has either ceased or slowed to an atypical pace and when student researchers, a few hired hands excepted, are not available.

A valid objection could be raised to a two-calendar-year plan which required law professors to teach three trimesters every year.10/ An interlude longer than the six-weeks summer vacation is needed if a teacher is to refuel, to refresh and enlarge his learning in the fields of his teaching and research. However, if he has a trimester of 14 weeks free every other year and twelve weeks for summer vacation, the resulting 26 weeks free from instructional duties represent about the same time that conventional schedules now make available over a two-year period. (Recesses during the school year presumably would be the same under both plans.)

The ability of faculty members to teach five trimesters every two years instead of four semesters would be of consequence to the school in budgetary straits. Extending the use of its plant to 46 weeks would not substantially increase costs, and a larger student body would provide a proportionate increase in tuition income. Would this easing of a school's economic stress entail a financial sacrifice of its students?

IV.

Actually, as I indicated earlier in this article, the two-calendar-year plan markedly reduces a law student's economic burden if it is

---

9/ What the status of the faculty member should be during the trimester free from teaching is a matter on which school policies might differ. Probably it would usually be treated as analogous either to the summer vacation or to "research status," in which the faculty member remains in residence but without teaching duties. Of course, it could be the occasion for the taking of a leave of absence. An attractive possibility that might sometimes be available would be to combine the Spring Trimester in one year with the Fall Trimester in the next year, thereby securing a block of time free for research or for a leave running from early April till the following January.

10/ The University of Florida required this for a time not long after my article appeared. Though no causal connection was shown, I am rather surprised that I was not burned in effigy. I did receive some poignant complaints with which I sympathized.

calculated over a three-year period. However, under the two-year plan his tuition expenses are heavier during the two years he is a student, and his opportunity to earn money during the summer is reduced. For the student lacking either means of his own or family support, the financing of a two-year plan requires access to credit. This is a problem larger than the law school world, one for which a solution must be sought on a corresponding scale. Until it is found, a student who had no practicable alternative might take one of the options that I noted earlier--postpone his fourth trimester or withdraw for a year after the first half of his course. For some students, either option might have merit independent of its financial utility.11/ The former option would lead to completion of law study about six months earlier than the present three-year course; the latter, about six weeks later.

To compare the financial effects of the two plans, I have postulated the case of a law student in a high-tuition school who can find summertime employment, including a good law office job in a big city in the summer after his second year, and who also secures work throughout his law school course. I assume that, when not at law school, he lives at home except during his law office employment. I have projected this student's expenses and income under both plans for a three-year period from July 1 following his graduation from college until June 30 of the third year thereafter, when, if he had taken the two-calendar-year course, he would have had ten months of practice. I have estimated his earnings on two scales: one affluent; the other, a third lower. I find that the two-year plan leads to a net cost over the three years of about $4,500 less than the three-year plan if earnings are estimated on the affluent basis and about $2,500 less on the reduced basis. If the student had had less success in obtaining summer and law school employment, the advantage of the two-year plan would be materially increased. My calculations are exposed in a table in the appendix.

Though I see important gains to be derived from the adoption of a two-calendar-year plan, this would undoubtedly entail adjustments on the part of all concerned, including the large law offices that now use the second summer for trial marriages and for those lawyers who have the specification of bar admission requirements and bar examination schedules in their charge. Deans should be an object of special solicitude: they should be relieved of decanal duties every third trimester. However, all these readjustments seem to me to be minimal in their hazards when compared to the drastic choices that would confront law faculties who, for all but a small fraction of their students, were to lop off one third of the law school course.

11/ A rather recent alumnus told me that he had dropped out for a year after his first year, earning enough to finance his next two years. When I asked him if he had felt handicapped upon his return to law study, he replied, "Yes--for about a week." Incidentally, experience during that year has done much to shape his career since graduation.

APPENDIX

Costs to the Student of the 3-Year and 2-Year Plans Compared
(For 3 Years from July 1, 1972 to June 30, 1975)

3-YEAR PLAN

	Expenses			
Tuition and Fees				
6 sems. @ $1,100	$ 6,600			
Law School Living Costs				
27 mos. @ $250	6,750			
Home Living Costs				
6 mos. @ $150	900			
Big City Living Costs				
3 mos. @ $400	1,200			
Total Expenses		$15,450		$15,450
	Income*			
Summer Earnings				
Pre-Law $2\frac{1}{2}$ mos. @ $500	$ 1,250		$ 850	
Post 1st Yr. 3 mos. @ $500	1,500		1,000	
Post 2nd Yr. 3 mos. @ $800	2,400		1,600	
Law School Earnings				
24 mos. @ $150	3,600		2,400	
Post-Graduation Salary	0		0	
	8,750		5,850	
Income Tax (approx.)	600		400	
Total Earnings		8,150		5,450
NET COST		$ 7,300		$10,000

2-YEAR PLAN

	Expenses			
Tuition and Fees				
6 Trims. @ $1,100	$ 6,600			
Law School Living Costs				
21 mos. @ $250	5,250			
Home Living Costs				
5 mos. @ $150	750			
Big City Living Costs				
10 mos. @ $400	4,000			
Total Expenses		$16,600		$16,600
	Income*			
Summer Earnings				
Pre-Law $2\frac{1}{2}$ mos. @ $500	$ 1,250		$ 850	
Law School Earnings				
19 mos. @ 150	2,850		1,850	
Post-Graduation Salary				
10 mos. @ $1,200	12,000		8,000	
	16,100		10,700	
Income Tax (approx.)	2,400		1,550	
Total Earnings		13,700		9,150
NET COST		$ 2,900		$ 7,450

* Earnings in the right-hand column are two thirds of those in the left-hand column. If pre-law, summer, and law school earnings are still lower, the 2-year plan's advantage increases.

THE PRESENT CRISIS IN AMERICAN LEGAL EDUCATION[*]

ARTHUR KINOY[†]

American legal education is in the throes of a deep and profound crisis. The symptoms of the crisis are real and universally acknowledged by every section of the law school community honest enough to face the truth. The surface symptoms of deep malaise, boredom, frustration, and dissatisfaction are erupting in every major law school. No law school, however eminent in its national reputation, has been immune from these symptomatic disturbances of underlying crisis.

What is perhaps extraordinary is that this crisis has manifested itself so suddenly, or, at least, that the recognition of its existence by the law school world has been so recent. Only 3 years ago, the President of the Association of American Law Schools could write in his annual address: "Perhaps my eyes are closed, but I do not detect any kind of political unrest among our law students." On this sanguine note, he concluded that "[l]egal education never had it so good. Let us not spoil it."[1] Two years later, in the same *Journal of Legal Education*, the lead article was entitled "Some Suggestions on Student Boredom in English and American Law Schools";[2] its opening sentence noted that: "The incidence and diversity of illness in American legal education have been well publicized."[3] At least progress has been made in recognizing the reality and universality of the crisis.

The articulation of the crisis takes many forms, often expressed in terms of sweeping student "boredom" or "loss of interest" after the first year of law school. More precisely, the verbalization has recently taken the form of a questioning—primarily by the students—of the "relevancy" of legal education to the problems of contemporary American society.

I would suggest[4] that the fundamental answers to the emerging crisis are *not* primarily to be found in formal changes in curriculum, processes of administration, or methods of teaching. These are always the first groping reactions of students and faculty to the crisis of symptoms. Often, the first target of criticism is the remaining influence of the Langdell case method. This, of course, is no new criticism; Jerome Frank cogently argued over 30 years ago that the so-called case method is not really a case method at all, but is rather an abbreviated abstraction of the decisional process from the reality of life.[5] Increasingly, it is being recognized that "case books" consisting of excerpted abstracts from decisions are, at best, inadequate and, at worst, insulting, particularly in respect to Supreme Court opinions. I shall never forget my dismay when, in my first year of law teaching, I discovered that the case book being used contained only an edited version of *Marbury v. Madison.*[6] But, as I will attempt to develop, efforts to correct the ancient evils of the inherited Langdell method, laudable as these efforts are, do not meet the fundamental problems. Similarly, formal curriculum changes have not solved the symptomatic eruptions of the underlying crisis. Today, most law schools have wide offerings in new courses, *e.g.*, the law of poverty and urban problems; yet these curriculum changes, helpful as they may be, have not stemmed the tide of rising student discontent and the concomitant faculty anxiety. In the same sense, the frantic and widespread experimentation with what has been rather inaccurately termed "clinical education" is simply another first reaction which often fails to come to grips with the fundamental problems. Many schools are discovering that mechanically sending students out into government agencies to do "practical work," or the oversimplified approach of bringing "practitioners" into the law school for occasional lectures on "life" does not automatically solve either the symptoms or the underlying causes of the universally acknowledged malaise affecting American law schools.[7]

---

[*] This article is the expansion of an address given by the author at the Harvard Law School on October 23, 1969. 49 HARVARD LAW RECORD No. 6, Oct. 30, 1969. The Harvard address was the extension of remarks first offered at a "Day of Dialogue" sponsored by the Student Bar Association of Georgetown University Law Center on March 26, 1969, where the author was one of the keynote speakers. Due to the current controversy over American legal education, the Editors believe that the article's publication at this time is most appropriate and would appreciate any response from our readers.—*Ed.*

[†] Professor of Law, Rutgers University, School of Law; A.B., Harvard College; LL.B., Columbia University, School of Law.

[1] Miller, *Law Schools in the Great Society*, 18 J. LEGAL ED. 247 (1966).

[2] Robertson, *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL ED. 278 (1968).

[3] *Id.* at 278.

[4] Some justification for the use throughout this article of the first personal pronoun may be in order. I would rather refer the reader to the comments of the late Judge Frank in one of his more controversial articles: "In some earlier writings, seeking to

I would suggest that the answers lie much deeper, that the problems are issues of *substance* which touch the fundamental role of law schools in American society. In a certain sense, the underlying crisis in legal education reflects, it seems to me, the underlying crisis in the legal profession itself. This crisis, affecting the entire profession, flows from a profound question which is, as yet, not wholly answered, but which intrudes itself into every aspect of professional activity today: How can law and a profession whose life is based upon law's existence, remain relevant to the pressing and fundamental problems of con-

---

avoid a show of egotism I used the impersonal approach, saying 'the writer' when I meant 'I'. I have come to believe that the first personal pronoun is less egotistic, for it abandons the impersonal disguise and frankly reveals the personal character of the statements." Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 n.2. (1947).

[5] Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933). *See also* Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

[6] 5 U.S. (1 Cranch) 137 (1803).

[7] *See, e.g.*, the ironic headline in the March 14, 1969 issue of the *Georgetown Law*

temporary American society, for example, the seemingly unending misery of a colonial war which has warped and distorted the very moral fabric of the nation, the urban crisis and the exploding upheavals of our black citizens demanding fulfillment of rights 300 years overdue, or the increasing threats to the existence of the most elementary democratic liberties of the American people? How is law and the processes of law, or, for that matter, the legal profession itself, relevant to the solution of these central issues which dominate American life? There are no easy solutions to these questions; those who so suggest are either naive or charlatans. In the search for the solutions to these problems lies the most exciting contemporary challenge to the American legal profession.

Practical illustrations of this search are more useful than extended rhetoric: The Supreme Court, for example, has recently issued one of the most extraordinary challenges to the profession in the landmark opinion of *Jones v. Alfred H. Mayer Company*.[8] I have elsewhere had the occasion both to discuss[9] and to debate[10] the significance of this first reassertion in over 100 years of the sweeping affirmative national power embodied in that "charter of universal freedom and equality"[11] —the 13th amendment—to eradicate all of the remaining "badges and indicia of slavery" from American life. As the Supreme Court stated, this is the very heart of our exploding urban crisis, since the "herding" of black men, women, and children into urban ghettos is *itself* a "relic" of the slave system.[12] By reasserting this reservoir of national power, the Court offered to the profession an opportunity to participate creatively in the most central and pressing problems of American life. The horizons of *Jones* are virtually boundless, and yet, the legal profession (with a few notable exceptions) has not accepted the challenge.[13] Only a few lawyers with vision and courage have begun to explore the fantastic possibilities of shaping legal actions and remedies based upon the profound understanding of the sweep of the 13th amendment, its "reflex character," reasserted in *Jones*. Messrs. William Ming and Thomas Sullivan of the Chicago bar, on behalf of over 400 black families, have instituted one of the most exciting legal actions

---

Weekly, "G.U.L.C. Student Apathy Hits Clinical Law Approaches".

[8] 392 U.S. 409 (1968).

[9] Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968).

[10] Kinoy, *Jones v. Mayer, An Historic Step Forward*, 22 VAND. L. REV. 475 (1969). This article is part of a symposium in *Vanderbilt* on the signficance of *Jones*. The other participants in the symposium are the Honorable Edward W. Brooke, the Honorable Sam J. Ervin, and Professor T. A. Smedley.

[11] *Cf.* Civil Rights Cases, 109 U.S. 3, 20 (1883). *See generally* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

[12] 392 U.S. at 442-43.

[13] As a matter of fact, the first academic responses to *Jones* were less than enthusiastic. *See, e.g.*, Henkin, *The Supreme Court, 1967 Term, Foreward: On Drawing Lines*, 82 HARV. L. REV. 63, 83 (1968).

in American history, *Contract Buyers League v. F. & F. Investment,*[14] in the Illinois federal district court, seeking relief from the overcharging of black families for the purchase of homes, an unfortunately prevalent practice in most American cities. In a precedent shattering decision, District Judge Will denied the motion to dismiss and *sustained* the cause of action under the 13th amendment, holding that "there cannot in this be markets or profits based on the color of a man's skin."[15] The possible extensions of *Contract Buyers* into every phase of economic and social discrimination against black citizens in the urban and rural ghettos are endless. To understand the challenge of *Jones,* to shape forms of action and modes of remedial relief creatively, and thus to participate actively as lawyers in the most pressing problem of our age, is a horizon of excitement and challenge to the bar.

There are dozens of other examples of this search for relevancy in legal practice which come to mind, although space will permit of only one other illustration. An extraordinary challenge to the profession in the last several years has been the profoundly new approach to the defense of first amendment freedoms opened by the Court in *Dombrowski v. Pfister.*[16] Much, of course, has been written about *Dombrowski* and its progeny, but what is here significant are the endless and exciting avenues opened for creative lawyers by the Court's recognition of an affirmative federal duty and power to provide protection against governmental action which creates, in the now famous words of Mr. Justice Brennan, a "chilling effect" upon the exercise by the citizenry of fundamental liberties.[17] Recently, the Court of Appeals for the Seventh Circuit in an historic opinion, *Stamler v. Willis,*[18] sustained the efforts of attorneys to apply the *Dombrowski* "chilling effect" concept to the activities of the House Committee on Un-American Activities.[19] In a sweeping opinion, the circuit court held that the constitutionality of the Committee and its mandate could be challenged in a federal civil action. Furthermore, the court directed that such a civil trial of the Committee and its past 20 years of activity should proceed *prior to* the pending federal criminal trials for contempt of Congress which were instituted against the plaintiffs in the civil injunctive action.[20] *Stamler* is just one of many examples of litigation presently pending throughout the country in which lawyers are seeking to accept the challenge of *Dombrowski* in exciting and creative ways. The precious liberties of the first amendment are "fragile" indeed and require the active intervention of lawyers acting in their most honored responsibility as "private attorney generals"[21] in defense of those liberties, upon the preservation of which, we have been so often told, the American system of government rests.

---

[14] 300 F. Supp. 210 (N.D. Ill. 1969).

[15] *Id.* at 216. "The inflated prices, higher interest rates and other onerous terms and conditions plaintiffs allege were imposed upon them, are in effect badges of slavery." Amicus brief of the United States for Plaintiff at 7 n.3, Contract Buyers League v. F. & F. Investment, 300 F. Supp. 210 (N.D. Ill. 1969). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 444 (1968) (Douglas, J., concurring).

[16] 380 U.S. 479 (1965).

[17] *Id.* at 487.

[18] 415 F.2d 1365 (7th Cir. 1969).

[19] *Id.* at 1369.

[20] *See id.*

There are in this country today many lawyers, young and old, who are beginning to participate in the exciting search for answers to the ever-pressing question of the relevancy of law and the legal profession to the central issues of the day. It is no coincidence that it was out of the Southern black movements of the early 1960's that a new insight into the role of the lawyer began to develop among lawyers and law students alike:[22] a recognition that a lawyer could place his or her full skills and talents at the service of people's struggle for the achievement of the American promises of equality, freedom, justice, and peace. Today, unlike the first days of the Southern struggles, from one end of the country to the other, there are hundreds and hundreds of lawyers attempting to fulfill this role. They are a new breed of lawyer, with deep roots in the honored past of our profession, who I would characterize as people's lawyers. And as they work and struggle to fulfill this concept of their vision of the lawyers' role—to place the full skill and art of their profession at the service of ever-growing movements of the people searching for solutions to the overwhelming social problems of our era—a body of legal experience develops, a body of knowledge, concepts, theories, and experiences which constitutes, in a certain sense, a new body of law. This new body of law for want of a better term, I would call the area of "people's law."

The critical problem in American legal education, I would suggest, is to discover ways to make law schools reflect the reality of these exciting "new frontiers" of the legal profession. Our law schools must cease functioning upon the unspoken premise which has, for at least 100 years, underlain legal education—that law schools, and particularly "eminent" national law schools, are primarily instrumentalities to train skillful technicians for American corporations and the government apparatus. The training of "business" lawyers and government technicians has been the silent premise underlying legal education in this country for a century or more.

---

[21] There are many examples of a creative utilization of the *Dombrowski* theory for the protection of the most varied forms of first amendment expression. Consider, for example, the recent pioneering opinion of Judge Matthews in Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (Ch. Div. 1969). Judge Matthews, in a careful opinion, applied the underlying concept of *Dombrowski* to strike down the "chilling effect" of an order of the Attorney General of the State of New Jersey that files and dossiers be kept by the state police on participants in demonstrations. *See also* the recent opinion of the fifth circuit in Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969), reversing, on the authority of *Dombrowski*, the dismissal of a complaint seeking an injunction against the alleged bad faith prosecution by a district attorney of a newspaper reporter.

[22] *See* Carter, *Civil Liberties and the Civil Rights Movement*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT (King & Quick eds. 1965). *See also* Kinoy, Book Review, 62 NW. U.L. REV. 653, 656-57 (1967).

I would suggest that the law schools must capture, if they are to overcome the deadly symptoms of the fundamental malaise that inflicts us all, the excitement of the new challenge of making law serve the needs of people in struggle as well as continuing to fulfill the needs of corporations and the business community. I do *not* argue for an abandonment of the latter role; I argue simply that, at a minimum, the law schools must no longer be, in essence, one-sided representatives of the dominant power group in society, but must make room, if they are to survive as vibrant, exciting centers for the teaching of young lawyers, for the new role—for the training of people's lawyers. In the last analysis, capturing this new excitement is the key to teaching—it is the bridge to relevancy. Some 2 years ago, a well-known jurist said at the dedication of the new Rutgers Law School building: "After all, there is one—and perhaps only one really essential ingredient for greatness in an educational or training institution and that is excitement, intellectual excitement that is so vital that it is emotional. Excitement and ferment—these are, I think, the salt and the yeast, which make a commonplace bill of fare worth the price, and without which everything is flat and tasteless."[23]

The central problem which must be squarely faced is *how* to capture within the law school the new excitement which is generated by contemporary attempts to meet the challenge of whether law and its institutions can remain relevant to the solution of society's fundamental problems. I would suggest that the primary answer is not to be found in efforts at surface reshaping of curricula or token readjustment of teaching techniques. The answer is to be found in a fundamental reexamination of the *role* of the law school. This is not a new response. It was first explored almost 35 years ago by a then young member of the Yale faculty, Jerome Frank, in an article which was, as is true with so many seminal ideas, misunderstood, ignored, and ultimately obliterated from the consciousness of the law school community.[24] In a bitter attack upon the separation of legal education from reality, he wrote, prophetically:

---

[23] Fortas, *The Training of the Practitioner*, address at dedication of Ackerson Hall, Rutgers Law School, September 10, 1966, *The Law School of Tomorrow* (Rutgers University Press) p. 190. It should not be necessary to add to this comment, but to put to bed any subjective reactions there may be to my quotation from this address of Mr. Justice Fortas, I am confident that the profession, while reserving its own opinions on the recent developments culminating in the resignation of the Justice, is objective enough and honest enough to refrain from the Orwellian eradication from consideration of all that a man has said or written because of a subsequent development in his life, which in the last analysis, only history and not his contemporary generation, can fairly judge.

[24] Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933).

> Students trained under the Langdell [case method] system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed dog study and the overproduction of stuffed shirts in the legal profession.[25]

The key to Judge Frank's thinking was his proposal that there must be built into the *heart* of the law school (not outside or at its periphery) a legal clinic. Law teachers themselves should teach students *as they function as lawyers*; this is the unity of theory and practice which every student of pedagogy knows is the finest and most fruitful method of teaching.[26]

The great challenge to the American law school today, it would seem to me, is to apply the insight of Judge Frank to the contemporary world, *i.e.*, to structure within the heart of the school, law clinics directed and guided by teachers of law which involve large numbers of students in taking on major cases and situations involving the relationship of the processes of the law to the fundamental problems of contemporary society.[27] The activity of the clinic, in close association with outside members of the bar involved in these cases and situations, would provide a fascinating teaching tool for probing into the most fundamental theoretical, substantive, and conceptual problems, all within the context of the throbbing excitement of reality. It would provide the "salt and the yeast" without which everything is "flat and tasteless."[28]

A few examples are required to concretize what might otherwise seem rhetoric: A clinic in a law school in Newark, New Jersey could involve itself in the fundamental problem of the relationship between the police of that city and its majority black community—a problem which the nation saw erupt so furiously in the summer of 1967. There are cases pending in the Newark federal courts involving creative new approaches to the control by a community of its police force including the challenging concept of the applicability of the federal equity remedy of receivership.[29] Additionally, in the city of Newark, there is the extraordinarily complex problem of the application of the reapportionment decisions to the gerrymandering of the black vote which cries for legal creativity and action.[30] For a law school in a majority black urban area like Newark the examples are countless, including the complex question of the possible inapplicability of a mechanical application of *Brown v. Board of Education's*[31] mandate for integrated public schools[32] in an area where the primary need is perhaps instead a more equitable allocation of state funds to the black urban center.[33] The involvement of the clinic within the school, taught and led by teachers within the school, with such problems of immediate reality, could provide the most fantastic opportunities for teaching theory, substance, and practice in an atmosphere of motivation and excitement.

---

[25] *Id.* at 912.

[26] It is sometimes embarrassing to recognize that almost every field of professional education except ours has attempted for some time to apply this unity of theory and practice. In medicine, and in social work, for example, the integration of field clinical training with academic instruction is commonplace. *See, e.g.*, the extremely thoughtful article of Professor Shapo entitled *Observation—An Internship Seminar for Law Students: A Test of Theory, A Critique of Practice*, 46 TEXAS L. REV. 479 (1968).

[27] It is my view that Frank's vision of the "lawyer school" has applicability also to the training of business and corporate lawyers. I leave, however, to my colleagues in these fields the development of examples of a true clinical approach in these areas. I could visualize many, but the proposals would best come from the teachers of corporate law themselves.

[28] *See* Fortas, *supra* note 23 at 190.

Or, if you will, take the example of a clinic within a Chicago law school, addressing itself to the problems presently unfolding in one of the most involved and complicated political trials in recent American history.[34] Such a clinic would provide teaching tools unparalleled in the experience of legal education. The problems which arise daily in such a trial are multidimensional in every sense. They raise the most profound questions of theory, strategy, practice, and fundamental legal philosophy. They offer "materials" for teaching beyond one's wildest expectations. As in Newark and Chicago, the examples of *living* pedagogic tools are endless. Earlier in this article, I had the occasion of referring to *Contract Buyers League v. F. & F. Investment*[35] presently pending in the Chicago district court. A clinic in a Chicago law school which attached itself to such a case, far beyond performing valuable services for the clients and lawyers, would find itself in the midst of a fascinating arena for discussing, debating, and wrestling with the new and exciting concepts of the breadth and scope of the 13th amendment opened by *Jones v. Alfred H. Mayer Company,* which Professor Charles Black of Yale only recently characterized, in the annual Edward Douglas White Lecture Series, as a "long look at the concept of citizenship, in its bearing on racism."[36]

A clinic within a law school in the nation's capital which helped think through the unusually complicated conceptual, substantive, and procedural problems in *Hobson v. Hansen,*[37] problems *still* unresolved

---

[29] *See* Kidd v. Addonizio, Civil No. 899-67 (D.N.J., filed Aug. 24, 1967), *discussed in* Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

[30] *See* Jackman v. Bodine, 38 U.S.L.W. 3013, *cert. denied, id.* at 3127 (Sept. 30, 1969).

[31] 347 U.S. 483 (1954).

[32] 115 CONG. REC. 15377 (daily ed. Dec. 2, 1969) (remarks of Senator Stennis).

[33] *See* CORE v. Board of Educ., 298 F. Supp. 213 (D. Conn. 1969).

[34] United States v. Dellinger, Crim. No. 18294 (N.D. Ill., filed March 20, 1969).

[35] 300 F. Supp. 210 (N.D. Ill. 1969).

[36] BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 61 (1969).

[37] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd. sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

2 years after Judge Skelly Wright's historic opinion in that case,[38] would be a living classroom where theory and practice could join in the magic which creates great teaching. Washington provides, of course, endless such opportunities. It needs no emphasis to point out what a teaching tool, in the fundamentals of American law, it might have been if one of the great law schools in the nation's capital had, through such a clinic, become deeply involved in the unfolding of the now landmark decision in *Powell v. McCormack*.[39] Out of the development of that litigation has emerged whole new insights into the most basic questions of justiciability, the political question doctrine, separation of powers, and the ultimate role of the Court itself. The intimate involvement of law students and their teachers in the unfolding of these concepts within the matrix of the reality of the adversary struggle would have provided a classroom of extraordinary dimensions. The opportunity was present, it need only to have been seized.[40]

The responsibility for the accomplishment of such a fundamental reorientation of the law school rests primarily upon the faculties. While it is true that in almost every school the initial *impetus* for this change in direction and role comes from the student body, and in many instances from the increasing numbers of black students, the responsibility for change, in the final analysis, is upon the faculty. A "clinical lawyer" school in the best sense of Judge Frank's analysis, within the contemporary context, requires teachers who are masters of their profession, who are lawyer-teachers in the greatest tradition of Story or Holmes. They must be men and women who combine the theory and practice of the new challenges before the profession. In 1933, Judge Frank placed the question of the psychology of the law teacher within the context of a pointed, if not barbed, discussion of the "architectural design" of American law schools: "A school with a library at its heart is what one may well imagine. The men who teach there, however interested they may once have been in the actualities of the law office and the courtroom must pay only a subordinate regard to those actualities. The books are the thing. The word, not the deed."[41]

To paraphrase Judge Frank's words, the American law school today must have the clinic "at its heart." A law school which is structured around clusters of teachers and students who are participating in the ongoing efforts of the profession—efforts to relate the law and its processes to the agonizing, difficult, and as yet unresolved problems of contemporary American society—will be a law school in which the insight of the greatest of American legal scholars, Mr. Justice Holmes—that the life of the law is experience—is truly the guiding philosophy.[42]

---

[38] *Id.*

[39] 395 U.S. 486 (1969).

[40] From the vantage point of a teacher, one of the most rewarding experiences of the last years was my opportunity to work with a group of approximately a dozen first and second year law students who volunteered to assist in the preparation of the Petitioner's Brief in *Powell*. The enthusiasm with which they dove into the most dust-ridden areas of English and colonial legal history to unearth exciting insights into the evolution of concepts which were later to play a significant part in the shaping of the Court's opinion was a joy to behold. Their work as students was not only, I believe, useful to themselves in an educational sense, but on its own made an objective, if modest, contribution to the shaping of an important turning-point decision in American law.

[41] Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1305 (1947).

Let no one raise the strawman that such a law school would abandon theory, or in Jerome Frank's architectural simile, would omit a "library." Quite to the contrary, the "library," the distilled theories and concepts of the past, would become a more vibrant, and more challenging part of the present. Such a law school would not only inject the ingredient of "excitement" into the curriculum, but would also catapult the law school into the forefront of the fundamental task which the nation has placed before the legal profession—to assist in solving the most gripping underlying problems of the day: meeting the needs of a people groping and struggling for the realization of the first promises of this Republic—the right of all people to "life, liberty and the pursuit of happiness." For those "lawyer-teachers" and law students who begin to move in this direction, there are great rewards—rewards this profession once placed above the achievement of status or monetary gains, for as we are often reminded: "Unless the lawyer is a participant in one form or another in the vitality, the agony of his time, I do not think that he can achieve professional greatness. For again, the life of the law is experience, and a man's horizon as a lawyer—the goal to which he can aspire—is limited by his participation in the experience of his time."[43] Let the American law schools participate in the experience of our times.

---

[42] It is of historical interest that the first training of American lawyers occurred primarily in the law office. This in turn led to the well-known distortion and one-sidedness of the "clerkship." The approach here suggested would, I believe, recapture the essence of the original vitality of learning through experience while merging it inextricably with the teaching of theory and philosophy.

[43] Fortas, *supra* note 23, at 192.

LAW SCHOOL DEVELOPMENTS

Once a year, this department will carry figures on law school registration. In addition it will provide a medium for the description of experiments in curriculum, teaching method, and administration. Like "comments", the typical law school development note will be characterized by brevity and informality; unlike them, it will be descriptive rather than argumentative and will deal primarily with devices which have been tested in actual operation. As a general rule, the authors will gladly answer inquiries and, to the extent available, upon request supply copies of materials referred to.

"OBJECTIVE" QUESTIONS IN LAW EXAMINATIONS

VAUGHN C. BALL *

Something like a hundred years ago, a wise old English gentleman wrote that the subject of questions was one of the least explored in the whole world. When he tried to explain why, he said: "As the eye sees everything but itself, so questions have interrogated everything but themselves." [1]

The use of so-called objective questions for legal examinations merits this sort of self-analysis. I say so-called objective questions, because I think the term is a considerable misnomer. To begin with, the kind of questions to be considered must be defined. That can be done most simply by stating the purposes that the questions are designed to carry out.

For myself, and for some of my colleagues, those purposes are three:

> 1. To obtain a more adequate sampling of the subject-matter of the examination—to ask more questions about more things in the same amount of time. The idea here is to reduce the accidental effects of choosing a few questions out of a large subject.
>
> 2. To increase the consistency of scoring from one paper to the next. This means that on such questions, a given paper will receive the same score whether graded first in a batch or last, whether it is the first good one in a poor string or not, or even if some other person does the scoring.
>
> 3. To reduce the amount of time required after the examination to do the work of scoring.

There are two features of the usual essay-type of question that are particularly baneful. One is the matter of writing time. On the essay examination, the student spends on the order of half of his allotted time in writing—in most cases in longhand. The twenty to forty pages that each student produces on a four-hour examination contain, I think, a surplus of samples of his writing ability, considered solely as writing. This statement in no sense questions the importance of writing ability. That is very important to the law student and should be tested. I am talking only about how long a sample of writing is needed in order to arrive at a reasonable evaluation of it. Once that amount is reached, the rest of the writing the student does is done for the reason that it is the only way he can record the results of his reading and thinking, which are what he does with the rest of his allotted time. If his writing time can be cut down without undue damage, more questions can be put in its place.

---

* Professor of Law, Ohio State University.

[1] ALEXANDER BRYAN JOHNSON, A TREATISE ON LANGUAGE: OR THE RELATION WHICH WORDS BEAR TO THINGS 241 (2d ptg. 1959).

The other feature of the essay examination that has been vexing is the feature of unlimited response. The term is relative, of course. The papers carry an over-all time limit and some general directions, like "discuss and decide"; but apart from that, there is no real limit to what may come back in the bluebooks. Giving more and shorter essay questions will not cut the writing time; and if the answers can take any written form, the draftsman of a question is really the only one who can grade it, because he must be ready to compare anything he may get with what he wanted, as he goes along. This open-ended possibility means he must put in a long scoring time after the examination is over.

One solution that tends to meet all these difficulties and to accomplish all three of the above-stated purposes is the kind of question usually called objective. The five examples given in the appendix will provide an idea of what it is like in the form used by some of the faculty at Ohio State University College of Law.[2] Concentration on the general format rather than on what the credit answers might be will show how the original three purposes are carried out. It will also point up the feature that distinguishes these questions from those of the essay type. These are essentially *limited response* questions, a description more accurate than the term "objective."

First, without deciding whether it can be done or not, there is no attempt to test writing ability on these questions. Instead, writing time is cut to the bone by shaping the questions so that the student can express his results in a code—that is, by a prearranged set of signals. The indefinite number of bluebook answers is cut by selecting a few—two or four or ten—of the likely lines of approach, or solution, and requiring each student to fix his consideration on them. What can come back is thus known in advance and can be evaluated before the examination is given. When the student takes the examination, he also evaluates these possibilities. What he does can then be compared in short order against what the examiner awarded to the various combinations. So long as the credits the examiner settled upon are adhered to, the results for each paper will always be the same; and the scorer need not be the examiner, nor any other kind of expert in the subject matter, nor even a person. The examiner has taken care of that for all the possible papers when he settled the credits to be given. This is the sense, and I think the only sense, in which such questions can be called objective.

---

[2] I shoulder the blame for all of these examples. In order not to limit them to my own field of teaching, I asked some of my brethren to help me out with questions; but in every case, I presumed to edit their suggestions in such a way as to fit each on a single page, and I saw them through the typing and reproduction.

This completes the definition. It excludes any completion or short-answer questions, to which the student writes his answer in a phrase, or a line or two, because the possibilities cannot be strictly evaluated in advance. Only a word or two need be said about the first two examples. Example number one is the familiar "True—False" or "Yes—No" type; and yet, it is a little out of the usual. There is, first, a fact pattern of some length, and then, a string of propositions all related to that pattern. This is an effort to meet the difficulty involved in the words "true" and "false," which are logical universals. I find logical universals rather rare in the legal field, unless I stick to all law and no facts. But by the use of this cluster of propositions, all hitting into the same facts, the student gets a context, which together with his knowledge of the subject, gives him a better idea of what the words "true" and "false" mean on that item.

Example number two, which is the multiple-choice type, carries this another step farther. Instead of measuring each proposition against an absolute, the student is given a set of propositions, every one of which purports to be a resolution of the problem, and is asked to pick the best solution not from the world of possible propositions, but from those presented. Such a question is harder to write, but pays off in having fewer hidden difficulties.

The last three examples present no innovation from the analytical standpoint. They are all attempts to do the same thing, which is to get more work out of the individual question, without any proportionate increase in the examining time. Example number three is what I call a ranking question. In setting up the grading charts for multiple-choice questions, some of us have found that we could not only put in a "best" choice, but a "worst" as well; and with a little attention to the language, we could rank the alternatives all the way from best to worst. This is what we do on essay answers. We do not give credit only to the best, with nothing to the others. We find more or less grasp of the problem and give credit accordingly. In that way, in a question scarcely any longer than the usual multiple choice, we could divide the students not just into two groups, those who could pick the best alternative and those who could not—or three groups if omission of the question is scored differently—but into several groups, from those who were not mixed up at all to those who were lost a long way from base. On example number three, five scores are possible, from 4 through 0. Even on the straight multiple-choice question, the students proceed partly by a kind of paired—comparison process. It is just that there no record appears of how their elimination proceeded, but here they make such a record. That gives, I think, additional information about what went on inside heads.

Example number four is another kind of question that tries to get more work out of the same amount of material presented to the student. It is known as a matching question. He is presented with two lists of things—in this case, bits of evidence on one side, and notions from the law of evidence on the other. He is asked to consider the things on the left side one at a time, and to indicate what on the right side is related to each in a manner specified by the question. These items can be anything desired, and other relations can be defined. The only limit is that they should be relations and things as to which it seems worthwhile to test the student. The hard part of constructing matching questions is defining the relationship that one asks the student to detect. In all these questions, one must pay for what one gets. It is easy to ask the student to match kings of England with regnal years, but what one learns about him is in proportion, and the more important relationships require more work by the examiner. But the question will do a great deal of work as well. With nine bits of testimony on the left, ten different scores are possible; and in this particular item, by giving part credit for some other choices, it was possible to increase that number.

There is only one more example to discuss before considering some problems of drafting. Example number five is a combination question, because it asks the student to do more than one thing with each item. In this particular question, he is given a fact pattern and ten propositions (some are omitted because of space limitations). In effect, he is first asked of each one whether it is a correct statement. Then, of the correct statements, he is asked whether they are applicable to a problem raised by the fact pattern. The number of possible scores is over a dozen for the five items.

These are not, of course, the only types of questions possible. There is no limit except that of the ability to invent.

Now that some samples of limited-response questions have been examined, the next step is to consider how to go about constructing them. The differences between these examples are really differences in the form in which they are presented. Where does the examiner begin when he wants to construct them? The answer is, of course, that he begins in the same way he does for an essay question. He picks out facts that raise legal problems for solution and writes them up. But he cannot stop with a direction to discuss and decide the rights of the parties. He must work out the rights of the parties then and there, and the points and rules and conclusions that would be contained in an essay answer; and state sets of alternatives which involve them. Then he must hook them up to the problem in such a way that the better thinking, so far as he can foresee, will lead to the better choices, and fit all this into the prearranged code system.

The crucial phrases here are "better thinking" and "better choices." They are crucial because they imply that the examiner must have in mind some poorer thinking and poorer choices. Every examiner does that, in a way, on essay questions. If he managed to write an essay question on which he thought some students would write perfect answers and the rest would write nothing at all, he would probably change it with the hope of getting a range of responses. On objective questions, the examiner must anticipate the thinking and the responses, select some that he presents in such a way as to force a choice or choices, and evaluate them before the examination. The total amount of time required to make and give and score the examination will be no less than with the essay. But saving of total time was not one of the stated purposes.

Obviously, the writing of good objective questions is a problem in precision drafting. It is customary to give a series of practical hints about this and to point out what are called "common pitfalls." To lawyers, I would say no more than that the drafting of these items should be approached in the same way one would approach a vital clause or paragraph in an important contract or deed or will—not the boiler-plate, but something on which the formbooks give little help, and which must be airtight to prevent the other side from tearing it to pieces. What one means and what one wants done must be stated as accurately as that.

Assuming that everything is going to be stated precisely, where does the examiner get the poorer and poorest approaches and alternatives? The best alternative comes from him, of course, because it is the one that starts him on the question, and frequently he has to make up the others as well. But I submit that the very best place to find them is in essay answers to essay questions. What the examiner is after is possible answers to his question, of differing quality, and certainly that is what he now gets on essays. I am firmly convinced that this advice is sound, and that it will work, and—that it is difficult to conform to. I can hardly take it myself. When a man decides to try objective questions because, for one thing, he cannot give essay questions the time he would like, it is hard to be told that for a while he must give them even more time—not only grading them in the usual way, but keeping notes of some of the answers he gets with an eye to someday turning them into objective questions. But if he will do it, he will turn out some of the best questions in the business.

First, he will find out from his students what question he really did ask them. Any ambiguities, any gaps in the facts, will show up and can be corrected. He will have before him, ready-made, a set of approaches or alternatives, some of which are better than others; and if he selects carefully, they will be answers each of which appears to a substantial number of students to be a correct answer. When an examiner makes up a question, the right answer is very plain to him, and it is hard for him to imagine how he would answer it wrong. The students can do a better job of writing up alternatives which are plausible, but not perfect, than the examiner can ever do for himself. We have all had the experience of getting answers that took a wrong turn and of saying that we could see how those students left the track; but we never would have thought of taking that turn ourselves. One timesaver can be suggested. It will be clear that when the alternatives have been chosen out of the essay answers, they must be greatly condensed before they can be used in objectives. This suggests that if we deliberately give a batch of unlimited response questions, but allow the students only a few lines to indicate how their answers would go, we may get the material we are after. I have tried this, and it not only works for this purpose, but it improves the sampling of the examination at the same time. Another trick is to give the question in objective form, but allow several lines for the student to state why he marked the way he did.

If a teacher cannot do any of these things, he can still write objective questions anyway, give them, and then study the results. This means really analyzing the results—not just glancing at the scores, looking up the best student in school to see if he is at the top, finding that he is several places down, and jumping to the judgment that there is nothing to these objective questions. One must know how the questions worked for the class as a whole before drawing any hasty conclusions. Take the total scores on the whole test, including both objective and essay questions, and split the class at the middle. (Unless the project has gone sour, the whole test is a more reliable indication of who has a good grasp of the subject than any one question or group of questions.) We may call the top half of the class the good students and the bottom half the not-so-good students for this purpose. Look to see what number of the good students answered the question correctly and what number of the not-so-good students. It would be gratifying to find all the wrong answers among the poor students. We will not, but to the degree that we do, the question is probably free from bugs that would mislead even a person whose over-all grasp of the subject is good. If we find as many or more wrong answers given by the good students as by the poor ones, we have a question that apparently did not work.

The next step is to examine the question in an effort to find out why. It must be weighed with a view to seeing how it could have been misunderstood and compared against questions that were successful by this standard to see what differences in manner of presentation there were that passed unnoticed when it was written. Many times we can see what the bug was, and correct it in the future. Even when we are unable to diagnose the trouble, we have separated out some questions that appear to do what was wanted and can pattern after them or even use them again. Above all, perfect results cannot be expected on this analysis.

A single item that takes the student only a few minutes to answer can obviously contribute only a small amount to the job of ranking the class the way it is ranked by a whole test or by an essay question on which the student spends half an hour or an hour. The way to compare such things is to compare units that take equal student time. There are other and better methods of analyzing questions than the one described, but they all depend on seeing how questions work in practice. In a very real sense, the best way to construct good questions is to construct many questions, identify the bad ones by trial, and cast them out. Even if the good ones are never used again, they serve as patterns.

Unlimited-response and limited-response questions have a long history in the world of academic examination. But if their essential features are considered, they have a parallel, and perhaps even longer, history in the world of another kind of examination—that is, the examination of witnesses in legal proceedings. If the reader will look back over what has been said, substituting the term direct examination for unlimited response, and cross-examination (with emphasis on the leading question) for limited response, the parallel will appear. The art of asking limited-response questions is, at base, another form of the art of cross-examination. As to that, John Henry Wigmore has said:[3]

> It is beyond doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience.

[3] WIGMORE ON EVIDENCE § 1367 (3d ed. 1940).

APPENDIX

EXAMPLE NO. 1

CIVIL PROCEDURE

P sued *D* in the United States District Court for the Southern District of Ohio, Eastern Division, alleging simply that *P* was a citizen of Kentucky, *D* was a citizen of Ohio, that *D*'s son, who was operating *D*'s automobile, negligently caused his automobile to strike *P*, causing certain injuries to *P*, and praying for the recovery of $10,000. The United States marshal served *D* by mailing to him a copy of the summons and of the petition. *D* filed a motion (timely and proper in form) in which he moved

(1) for a more definite statement, by stating the respects in which *P* contended that *D*'s son was negligent;

(2) to dismiss, for failure to state a claim upon which relief can be granted, in that *P* was guilty of contributory negligence, having pleaded guilty in Municipal Court to jaywalking at the time of the accident; and

(3) to quash the summons and service, for the reason that *P* filed no praecipe requesting the issuance of summons.

The court overruled all three branches of *D*'s motion. *D* then filed an answer in which he set up the following defenses:

(1) *P* was actually a citizen of Ohio, and, therefore, the court had no jurisdiction over the subject matter.

(2) Insufficiency of service of process, in that service of summons by mail is not permitted by the Federal Rules.

(3) Failure to state a claim upon which relief can be granted.

(4) A denial that *D*'s son was negligent.

(5) *P* had accepted $300.00 from *D* in full settlement of his claim and had executed and delivered a release to *D*.

T F (a) Branch (1) of *D*'s motion should have been sustained.

T F (b) Disregarding the question of its sufficiency, the objection asserted in branch (1) of the motion could have been asserted in an answer instead of in a motion.

T F (c) Branch (2) of *D*'s motion should have been sustained for the reason advanced in *D*'s motion.

T F (d) Branch (3) of *D*'s motion should have been sustained.

T F (e) The first defense in *D*'s answer was waived by *D*'s failure to include it in his motion.

T F (f) Disregarding the question of its sufficiency, the first defense in *D*'s answer could properly have been included in his motion.

T F (g) The second defense in *D*'s answer was waived by *D*'s failure to include it in his motion.

* * *

T F (l) On the facts given, *P* will admit *D*'s fifth defense if he fails to file a reply.

[Examinees are instructed to circle T for true, F for false. Time allowed: twenty-five minutes for the problem of twelve items.]

EXAMPLE NO. 2

CONFLICT OF LAWS

D, a resident of *F-1*, injured *P*, a resident of *F-2*, in *F-2*. *P* then moved to *F-3*. Three and one-half years later, *P* sued *D* in an *F-3* federal district court. *F-3* has a four-year statute of limitations for torts; *F-1* and *F-2* have three-year statutes of limitations for torts. Decisions in the state courts of all three states have held that the local statute of limitations is to be applied irrespective of the place in which a tort occurred.

Pursuant to section 1404(a) of the Judicial Code, the federal district court of *F-3* transferred this cause to the *F-2* federal district court. The case is now pending in the *F-2* federal district court. Of those below, the additional fact most helpful to *D*'s defense is:

a. *F-3* has adopted the doctrine of forum non conveniens and would have dismissed *P*'s suit in this case had he sued in a state court.

b. *F-3* has not adopted the doctrine of forum non conveniens.

c. *F-2* has not adopted the doctrine of forum non conveniens.

d. Section 1404(a) has been given a broader interpretation by the United States Supreme Court than the older doctrine of forum non conveniens.

e. This action was brought under the Federal Employers' Liability Act.

The additional fact most helpful
to *D*'s defense is .... ( )

[Examinees are instructed that *F-1*, etc., refer to states of the United States. Time allowed: approximately six minutes.]

EXAMPLE NO. 3

CRIMINAL LAW

In each of the following cases, place the number 1 in the space to the left of the statement the proof of which would be most helpful to your case, the number 2 by the next-most-helpful statement, etc. *All four* statements in each case should be numbered, in the order of their helpfulness to your position.

Case A: You represent *D*, who is charged with the crime of burglary under a statute which codifies the common law of burglary.

——— (a) The building which *D* is charged with burglarizing was not occupied by anyone at the time of the alleged burglary.

——— (b) The alleged burglary took place at 11 o'clock in the morning.

——— (c) The alleged burglary consisted of *D*'s firing a gun, causing a bullet to enter the building at a point next to the lock on the door.

——— (d) The intent of *D* in entering the building was to shoot *V*, whom *D* had observed fifteen minutes earlier in the act of adultery with *D*'s wife.

* * *

Case II: You represent *D*. *D* has sold pain-relief pills, containing codeine, to the public, without obtaining a permit from the state department of health under a state law prohibiting the sale of products containing (among other things) codeine unless such a permit is obtained. Criminal penalties are provided for selling such products without a permit, and *D* is charged with a violation of this law.

——— (a) *D* had inquired of his counsel, who told him "I have checked into the matter and your old permit is still valid." The old permit had expired.

——— (b) A deputy state health commissioner had advised *D* that he was exempt from the statute's requirements.

——— (c) *D* received a permit letter in the mail, which he suspected had been mailed to him because of an error of a Department employee. In fact his suspicion was justified, as the Department had revoked his permit the day before it was mailed. *D*'s secretary told him that he had received several telephone calls from the Department, but he refused to take the calls and proceeded to sell his pills before the Department could reach him by registered mail to tell him that his permit had been revoked.

——— (d) *D* thought that his product no longer contained codeine, but he had not checked into the ingredients used by his manufacturing department for over a year.

[Examinees are instructed that all facts occur in a state of the United States. Time allowed: one hour for twelve such items.]

EXAMPLE NO. 4

EVIDENCE

[Examinees were presented with a two-page outline of "contentions of the parties" in *Paul Patient v. Diligent Drugs, Inc.*, an action for personal injury for alleged negligent misfilling of a medical prescription. The example below was part of an examination based on the outline.]

V. This question is a "matching" problem. In the left-hand column are answers given by Mr. Nosey, who testified (as a witness for plaintiff) that he was a salesman and a neighbor of Mr. and Mrs. Patient, who had visited him on June 27, the day after Patient began taking the prescription. In the right-hand column are some terms and concepts from the law of evidence. In the blank preceding each of Nosey's answers, write the letter of the term or concept which is decisive of the admission or exclusion of that answer.

——— "Paul was a very sick man."

——— "Paul seemed to me to be suffering from food poisoning."

——— "It was plain that somebody had made a dangerous error on those capsules."

——— "Paul complained of being unable to swallow."

A) Lack of first-hand knowledge.

B) Declarations of present bodily condition.

C) Collective facts doctrine.

______ "Paul couldn't seem to see things right in front of him."

______ "Paul staggered when he walked."

______ "When Paul said to 'come in,' his voice was husky—just a whisper."

______ "Paul's pupils were so dilated his eyes looked black instead of their usual blue."

______ "It must have been something Paul ate that did it."

D) Subject of expert testimony only.

E) Statement of mixed law and fact.

F) Direct testimony to facts, rather than opinion.

[Time allowed: approximately fifteen minutes for this question.]

EXAMPLE NO. 5

AGENCY

PART I

Desiring to increase his Jersey dairy herd, Partridge, an Ohio dairy farmer, sent Abbot, his general "man of all work" to an auction, asking Abbot to buy Partridge two good Jersey cows as cheap as possible, but in no event for over $300 each.

The auctioneer offered separately some Jersey, some Angus, and some Hereford cattle. The only good buy, Abbot felt, was an Angus owned by Telford, which was knocked down to Abbot for $350.

Telford's white colt was then offered, and knowing that Partridge greatly admired white horses, Abbot bid this in for $250. Both bids were made and entered under Partridge's name for later billing.

When Abbot and the animals arrived, Partridge told Abbot that Angus were meat, not dairy cattle (which was true); and that he didn't want a colt, even a white one. He called Telford and told him he repudiated both purchases and would not pay. Telford insisted Partridge must pay.

PART II

Mark each of the legal propositions or conclusions below in one of three ways: CA for one that is both generally accepted as correct and applicable to the facts in Part I; X for a conclusion that is not so accepted, regardless of whether applicable or not; and NA for a conclusion that is generally accepted as correct, but is *not* applicable to the facts.

______ 1. A person who relies reasonably in good faith upon the representations of person *A* that he (*A*) is an agent of another person may hold such other person as principal.

______ 2. When a third person is unaware of the existence of a principal, the principal cannot be estopped to deny apparent authority.

——— 3. If an agent exceeds his special and limited authority, the principal is not bound by his acts, unless the principal has held him out as possessing a more enlarged authority.

——— 4. When a principal authorizes an agent to do a certain act in a certain way, the principal is protected from liability for an act in violation of the instructions if the third person is informed of them before the violation.

* * *

——— 10. The fact that Abbot was a "general man of all work" made him a general agent, as distinguished from a special agent, when he attended the auction at Partridge's request.

[Time allowed: twenty-five minutes for the ten items.]

THE LAW IN UNITED STATES HISTORY

WILLARD HURST

Professor of Law, University of Wisconsin

(Read April 21, 1960)

1.

Not only the man in the street but also professional students of society hold very limited images of what "law" means. Most often they take it to mean simply the drama of criminal trials: Perry Mason on Saturday night television, the lurid promise of the murder yarns on drugstore racks. If they think of law in a little broader reference, probably it will be in terms of a remembered picture in a high school history text, of portly gentlemen in frock coats, striking attitudes: Webster replies to Hayne. If one presses them, the social scientists at least may concede there is more to law than this. Law, they will grant, states a great many doctrines which provide much of the vocabulary of public policy discussion. But this is, after all, largely formal stuff; sophisticated students know that reality lies in the substance, in operations, in getting behind the law's formalism to the hard facts of interest and practical maneuver. So much for law—and little wonder, then, if neither the man in the street nor the student of society shows much curiosity to learn what aspects of social events or social processes might be better illumined by knowing more about the law's contribution.

Criminal trials and constitutional debates are important. Important, too, in ways which to a distressing degree are not understood even by well-educated men, is the formality of legal process. But these aspects of legal order, however important, fall far short altogether of representing the significance of legal process in this society. A more adequate definition of the attributes of our legal order suggests that study of law in these terms—and in particular study of legal history in these terms—should contribute more to the understanding of the society than the lay stereotypes would indicate.

For studying social process, the most useful definitions of law are made in terms of social functions of law. What are the most distinctive and most important jobs we have asked the law to do in this society? This asks for a modest definition: not what is "law," anywhere, anytime, but what has law been in the development of this particular society. This modesty is appropriate to the limits of what we know about the social functions of legal order. It is appropriate also to a definition of law looked at historically, because history regards events, that is, looks at processes always in particular context. Moreover, this relativist definition of law is peculiarly appropriate to our situation. For we have taken as a central value the idea that legal order should find its warrant in serving men as they strive to realize the larger potential of being—which means that law must find its warrant in relation to particular experience.

Four functions have been specially important to defining law's roles in the growth of this society. (1) To law we assigned the legitimate monopoly of violence; normally only the policeman goes armed. As a corollary, to law we assigned ultimate scrutiny of the legitimacy of all forms of secular power developed within the society—that is, of all means by which some men may exercise compulsion over the wills of other men. Modes of competition and forms of private association thus exist subject to legal regulation to protect the public interest. (2) We used law to define and to implement an idea of constitutionalism as the norm of all secular power. This is an idea which with us had reference to all forms of secular power, not merely to official power. It meant, first, that we believed there should be no center of secular power which was not in some way subject to review by another center of such power. If there seems something paradoxical in this notion, the historic record nonetheless shows that we lived by it; for example, we used law to foster and protect the growth of private (that is, non-official) associations like the business corporation or religious, political and social associations, to build centers of energy and opinion which might provide counter weights to official power. Thus we sought to make all secular power responsible to power outside itself, for ends which it

PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, VOL. 104, NO. 5, OCTOBER, 1960

alone did not define. But responsibility means nothing until we know, responsibility for what? The second and most distinctive aspect of our insistence that all secular power be responsible (constitutional) power, was that we held the final measure of responsibility to be in serving individual life. (3) We used law to promote formal definition of values and of appropriate means to implement values. In other words, this legal order was characterized by strong insistence on procedural regularity. (4) Finally, we assigned to legal process important roles in allocating scarce resources—of manpower and human talent, as well as of non-human sources of energy—for shaping the general course of economic development. This was an especially important use of law, in a society which believed that in economic creativity it held the means to fashion new standards of human dignity. At the outset government here held the unique asset of the public domain, which we spent to help build turnpikes, canals, and railroads and to create in the Mississippi Valley a republic of family farms. Likewise, we made bold use of taxing and spending powers of national, state, and local governments to help create the framework of economic growth. Resource allocation by law was the more striking in our history because we placed great reliance on broad dispersion of economic decision making into private hands through the market, implemented through the law of property and contract. We supplemented private energies in market by important delegations to non-official persons of powers of public concern. We gave railroads the right of eminent domain; we granted franchises to enterprisers to conduct public utilities and to charge toll for their services; by grant of limited liability to corporation stockholders and by contract, property and tort doctrines which in effect favored venture, we encouraged men to take the risks of action, letting losses lie where they fell unless someone who had been hurt showed compelling reason why the law should help shift the burden.

These uses of law mean that law wove itself into the organization and processes of this society in ways which should make the study of legal process—and in particular of legal history—important to social science. (1) Because it held the legitimate monopoly of force, and incident thereto the authority to call to account all other forms of secular power, law bore some relation to all types of association and all means for mustering collective will and feeling. The obverse of free religious association here, for example, was the legally embodied policy of separation of church and state. (2) Because North American legal order sought to give content to the idea that all power must be constitutional (responsible) power, law entered into the practical meaning that individuality had in this society. The constitutional character of this legal order likewise meant that law was actually or potentially part of the social structure and social process; there was no pattern of social organization, no procedure of social interaction whose significance could be appraised without taking into account the demands which an ideal of constitutional order either did in fact make on it, or should make on it. Thus, for example, we cannot tell the story of the status and roles of women in the United States without including the meaning which the movements for married women's property legislation and equal suffrage had for defining the condition of woman as an effective member of the society. Again, we cannot understand the social history of the business corporation without including the search for acceptable definitions in law of the grounds on which, first, the practical power of corporate owners, and, more recently, of corporate management may establish legitimacy. (3) Because this legal order emphasized procedural regularity—providing diverse organized means for bringing choices to definition and mustering evidence and reasoned argument for their resolution—law entered significantly into the process by which men created social goals and mobilized energies of mind and feeling to move toward their goals. Of course we must not exaggerate the rationality of the law, any more than of other institutions. Regard for procedures tends to create inertia or complacency with familiar ways; passion and prejudice color legal operations as they color any human operations where men feel deep concern about the stakes. Moreover, how men feel is at least as valid a part of their experience as what they achieve by reason; indeed, reason probably finds justification ultimately only as an instrument by which men achieve more subtle, more varied, and more shared emotion. So qualified, however, and always within the framework of a constitutional ordering of power, the increase in men's rational competence and the extension of more rationalized processes of human relations ranked high among the organizing values of this society. Legal process ranked with industrial technology and with organized science as a major means to enlarge the scope of rationalized behavior. In the second half of the twentieth century the trend of events seemed likely to give larger importance to the law's rationalizing role, in the interests of maintaining a vital constitutional tradition. The pressure of scientific and technical rationalization of social processes increased the scale and intricacy of social organization, the demands made in the name of organizational integrity and efficiency, and the inertia created by organization mass. Legal procedures in part had served and would continue to serve to provide a framework of reasonably assured expectations, backed by the force of the state, within which a complex social division of labor could work. More important, however, in our tradition legal procedure had the ultimate function of implementing the constitutional idea—that choices and the costs as well as gains of choices be brought to definition, that power holders be made to account for their use of power, and all this in last analysis that power be used to serve individual life. That growth proceeded along these lines was witnessed by the painful efforts to hammer out a law of labor relations within which management and labor might create a kind of due process and equal protection of law to govern the discipline of the modern factory. (4) Because we used law boldly as a means of resource allocation—with at least as great effect as we used the market—the history of legal process was woven closely into the general growth of the economy and of key relations of social and economic power in the United States. The terms on which we disposed of the public domain in the Mississippi Valley, for example, materially affected the development of a tradition of agrarian political revolt on the one hand, and on the other the growth of the political as well as business and social power of big corporations, of which the first models were the land-grant railroads. The public domain no longer offers government the unique leverage it afforded for nineteenth-century social planning—though current controversy over franchises for use of the air waves reminds us that social growth may bring new areas of public domain into policy significance. However, through its fiscal powers twentieth-century government plays as large a role in affecting the directions and content of the commonwealth as did nineteenth-century government through the public lands. Demands upon the resources-allocation functions of law continue to involve law in the main processes of social change and stability.

Finally, let me note that these social functions of law mean that legal processes produce uncommonly valuable raw materials for studying institutions, transactions, and events whose main focus lies outside law. Law's procedural emphasis—its provision of varied methods of bringing to definition and decision value choices of all degrees of importance—is at the bottom of the fact that law tends to build a storehouse of data for general social science. But it is the fact that law's procedures work for purposes set by the other three functions of legal order that produces the activity that fills the storehouse. Law scrutinizes the over-all dispositions of power in the society; it embodies and insists upon the constitutional idea that the uses of power show justification; it is used to reach decisions on resource allocation outside the market calculus. These functions mean that a great range of men's economic and social as well as their political objectives, tensions, and strivings are made more visible and are caused to leave more tangible evidences of their presence, through legal records. In constitutions, statutes, judgments, and executive and administrative orders, and in the enormous volume of statement and rationalization which surround these in recorded proceedings, in committee reports, in judicial and administrative opinions, as well as in petitions and bills and such routine forms as the income tax return—in all these we have one of the largest and perhaps on the whole the most ordered body of evidence that any of our institutions produces, to reflect many of our values and the troubles we have in bringing values to awareness and doing something about them. It is a sign of the too narrow ideas that the student as well as the man in the street has of law's functions, that both historical and current cross-sectional study of human relations have made limited use of the data afforded by legal process.

2.

However, if laymen draw less understanding than they might from legal materials, they may properly say that they have had little guidance from law men to do better. Aside from providing concepts and ordering judicial precedents for the immediate operating needs of bench and bar, legal research has a thin record of accomplishment over the past ninety years in which university law schools have grown to some stature. The defects are not primarily defects of method, though when we press more ambitious study of legal order we as soon encounter the hard limits of our present techniques as do students of other aspects of men's behavior. But at this stage the trouble lies much deeper than method. The fundamental defect is a want of philosophy. Legal research has moved within very limited borders, relative to its proper field, because it has not been grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present.

This essay seeks to appraise United States legal history as a field of scholarship, in its promise and in its development to date. I need not, nor could I within this span, take stock of the whole reach of research in law. However, what can be said of the discipline of legal history applies in large measure to other types of legal research.

Research and writing in North American legal history show four major limitations. Implicit are limitations of conception which characterize most of the published work. Here criticism should move carefully. Where men have defined meaningful problems for study it is irrelevant as well as unfair to criticize the particular product because it does not deal with some different subject. Fair criticism may be made of the over-all allocation of energy, where work concentrates on a narrow range of problems to the neglect of others of equal or greater meaning. Fair criticism may be made where the over-all allocation of effort rests on express or implied rejection of other themes for whose development a good case can be made. Fair criticism may be made where particular work is done from a parochial point of view which omits effort to trace relations either to the larger issues of legal order or to the relations of legal to social order. There is much work that needs doing in the study of our legal history, and thus far there are too few able recruits for the work. Hence the most pertinent criticism may be not of particular jobs done, but of the failure of practicing legal historians to show the excitement inherent in the field with enough conviction to enlist more talent for the whole enterprise. Ordered learning is made from the building blocks fashioned by devoted study of particulars. There need be no parochialism in work on a limited subject, if the worker sees the subject in relation to a large context. But significant ordered learning does not consist in rubble, nor does it grow without the skill of master craftsmen who know how to fit building blocks together.

Four limitations of the general product attest the want of philosophy in the study of North American legal history. (1) Historians have exaggerated the work of courts and legal activity immediately related to litigation. (2) They have paid too little attention to the social functions of law. (3) They have not distributed their effort with adequate response to the facts of timing and the reality of major discontinuities in the country's growth in relation to the uses of law. (4) They have exaggerated areas of conscious conflict and deliberated action, at the expense of realistic account of the weight of social inertia and the momentum of social drift.

Anglo-American law men are by tradition and training biased toward equating law with what judges do, to the neglect not only of legislative, executive, and administrative activity, but also to the neglect even of the out-of-court impact of the work of lawyers, let alone the additions or subtractions made in legal order by lay attitudes and practices affecting legal norms. We early trained lawyers by apprenticeship which taught them court pleadings and client caretaking. When the principal revolution in legal education arrived in the 1870's, it was organized about the case method of instruction, which again emphasized the work of courts. Most of the business of the bar through the nineteenth century had to do with the property and contract affairs of clients, and most of the law of these fields was common (that is, judge-made) law, so that through the formative period of our main legal tradition the focus remained on the judicial process. Thus, first our treatise writing and later the writing done for legal journals dealt mainly with public policy as declared by courts. This bias of professional thinking was not affected by the fact that through the nineteenth century Congress and the state legislatures churned out large quantities of important legislation, or by the fact that in great areas of policy which did not lend themselves easily to common law development the framework of the law was erected mainly in statutes (as in the law of the public lands, public education, public utilities, highways, health and sanitation, or the organization of local government). From limited beginnings in the late nineteenth century, executive and administrative lawmaking grew to great proportions alongside the statute law. Judicial law-making was never as exclusively important as the concentration of legal writing might seem to show. From the 1870's on, legislative, executive, and administrative processes definitely became the principal sources of formed policy. The course offerings of even the better law schools were slow to reflect this reality. But legal research was even slower, with legal historians badly lagging the field. Of course the work of the courts continues of great importance. In our time legal and non-legal institutions take on increasing size and there is growing readiness to accept demands made on individuals in the name of the security and operating efficiency of large social aggregates. In this context more than ever before the availability of independent courts and an independent class of professional advocates supported not by grace of the state but by private fees, represent basic elements of civil liberty. In the second half of the twentieth century the courts have distinctive importance because they are the forum in which individuals and small groups, of their own resources, can best call organized power to account. To recognize this, however, in no measure justifies the extent to which legal history writing, along with legal philosophy and other legal research, has treated the judicial process as if it were the whole of legal order. Symbolic is the fact, for example, that while twentieth-century scholarship has given us at least four large-scale treatises, a dozen substantial monographs and scores of essays in the law journals on the history of constitutional doctrine as it has been made by the Supreme Court of the United States, we lack a single first-rate modern work on the history of constitutional doctrine as it has been formed in the Congress.

The bulk of legal history writing has been about topics defined by legal categories. We have much writing about commerce clause doctrine, but little about the meaning of commerce clause doctrine for the development or operation of sectional or nationwide marketing organization, or about the impress which such business history may have made on constitutional principles. There is some rather formal history of property law, but little history of the significance of fee simple title for types of land use, for the private and social accounting of income and costs of alternative land uses, or for the political and social balance of power. There are some essays on the history of contract law, but little or no effort to define or appraise the meaning that contract law had for the functioning of the market, the provision of credit, or the allocation of gains and costs of business venture. There are scattered writings about the history of the mortgage, the corporate indenture, the receivership and tax law, but we lack the good studies we should have of the historic relations of law to the growth and channeling of investment capital. There is a good deal in print about various aspects of the Bill of Rights, but no connected story of the implications of civil rights doctrines for the shifting balance of power among various kinds of groups and between the individual and official and private group power at different stages of the country's growth. Though better than a generation has gone by since we heard the call for a sociological jurisprudence, legal history writing has made little response, but continues content on the whole to let the formal headings of the law fix its subject matter. It is an ironic course of affairs, in a society whose tradition is so strongly constitutional, insisting that legal order is not an end in itself but gains legitimate meaning only in terms of its service to ends of life outside law.

In the total distribution of effort, there has been a disproportionate attention in legal history writing to beginnings—and to beginnings in their most obvious sense—at the expense of proper development of hypotheses concerning the main lines of growth through to our own time. Much attention has focused on colonial origins, on the period of constitutional experiment from 1776 to 1790, and on the successive frontier phases of national expansion. I do not quarrel with the worth of attending to such formative periods taken in themselves, but only with the tendency to fasten onto origins without equal curiosity to follow through, and with failure to see that in terms of law's relation to gathering issues of power and social function there were other less obvious periods of beginnings which should also be studied. First, as an example of the want of follow through, it is odd that for so many states we have writing which with care sometimes verging on antiquarian enthusiasm traces the beginnings of territorial and state courts (once again, the excessive preoccupation with judicial process), but little good writing on such basic themes as law's relation to the creation of transportation networks, the law's response to the business cycle, or the relation of tax policy to the fortunes of agriculture and other extractive industries. These omissions are, of course, part of the neglect of the social-function history of law which I have already noted. But they also represent a neglect of a familiar and important time sequence characteristic of the growth of these states, whose people normally established their basic legal institutions in the nineteenth century with some obvious impatience to get on to their central care, which was the expansion of their economy.

Second, on the neglect of the less obvious beginnings, the most notable examples are the relative inattention to the sharp changes in direction and pace of social movement which came about in the 1830's, the 1870's, and the 1930's. The 1830's saw rapid development of markets and marketing emphasis in the public policy-making of one state after another, with reflection especially in the statute books, as we passed from relatively simple agrarian to more commercial and credit-centered economies. The 1870's saw the rapid cumulation of forces channeled or given new impetus by the new scale of organization of men and capital and the new techniques of public and private finance generated out of the North's war effort. Change here was far more drastic than in the 1830's and amounted to a major break in continuity. Due mainly to the shifts in the size of private industrial and financial organization and in the reach of markets which gathered force in the '70s, by the late '90s the United States was a qualitatively different society from what it had been before the Civil War. The strains and conflicts, the gains and losses attendant upon this rapid and major alteration of the country's power structure and modes of operation provide main themes for legal history which we have hardly begun to explore. The 1930's saw the cumulated impact of trends in social and economic interdependence which had been gathering force since World War I. The challenge of these themes is so large, indeed, that one may wonder whether more essays on territorial beginnings represent so much contributions to knowledge as refuges from more exacting studies.

Legal history research may be especially subject to a bias toward themes of conflict, or at least toward themes which emphasize conscious and debated decisions. Such a bias is favored by the emphasis of our legal order on formal procedures. So far as they are efficient, regular procedures for framing, deliberating, and adopting constitutions, statutes, executive orders and administrative rules work toward bringing choices to definition, aligning interested parties, promoting expression and energizing will. Lawsuits and court decisions work even more dramatically to these ends. Hence, so far as legal history research has tended toward exaggerated emphasis upon the judicial process, it has particularly strengthened a bias toward equating men's history with the record of their more or less conscious strivings. Yet, the broader the reach of our hypotheses and the deeper our concern to study the social functions of legal order, the more we will learn to respect the relative influence of inertia and drift in affairs. The most realistic view of all aspects of man's history leads to the conclusion that most of what has happened to men has happened without their wanting it or striving for it or opposing it or—more important—without their being aware of the meaning of trends until patterns of structure and force have developed past points of revoking. This general judgment seems no less true of legal history in this country. There is peculiar irony in the fact, since it is the business of constitutional legal order to promote responsible control of events. No example is more instructive than the history of antitrust law, whose development both reflected and persistently lagged the imperious course of revolutions in industrial and financial organization. Aside from some efforts either to expound or refute Marxian styles of hypothesis,—and even here the institutional cast of language only thinly disguises villains or heroes felt to be working in the background—the writing of North American legal history has paid little attention to putting legal phenomena in due perspective relative to the massive weight of inertia or to the implacable movement of decisions taken by drift and default.

3.

If legal history research and writing in this country have moved within too narrow limits, the criticisms point to some positive prescriptions. (1) We need allocate more effort to studying legislative, executive, and administrative processes as well as the bar's contributions to these formal processes and to the informal social regulation that goes on through the market and through private association. Likewise we need more attention to ways in which lay attitudes toward law (including laymen's disregard of law or their mistaken images of it) have affected the creation of institutions of social order other than formal legal institutions. (2) Legal history should begin to contribute more to develop fact-based, fact-tested theories of social structure and social process. For example, we should have more legal history written in terms of law's operational significance for the institution of the market, studied in as wide a range of interplay of law and market as the wit and devotion of legal scholarship can compass. (3) Legal history writing should come to bear with greater emphasis upon the past one hundred years in the United States. Especially should there be substantial scholarly investment in study of the profound shifts in structure, process, and attitudes that occurred in the generations beginning about 1820 and 1861, and in the depression 1930's. Legal history has not been made only by quill pen and candlelight. (4) Not with despair but with realistic estimate of the odds against man's conscious contrivance and out of convicton that his distinctive quality lies in rebellion against the odds, legal history should treat as critical themes the impact of social inertia and social drift. Nor can we afford to take this direction with any moral complacency, weighing our own shrewdness against the blunders of our ancestors. If the more significant decisions regarding natural resources use were made by default in the nineteenth century, no less by default have been the twentieth-century decisions on metropolitan growth; if the nineteenth century allowed market demands for rail transport unduly to determine the course of public policy, no less has the twentieth century allowed the immediate conveniences, comforts, and social status markings of the automobile to determine a fantastic range of matters of public concern, from the safety of life to the location of commerce and industry. The physical size of this country, the invitations to large-scale economic effort posed by its natural resources and population growth, as well as deep-rooted, but little-calculated faith in the self-evident values of growth and movement and change (in intangible senses of status and accomplishment as well as by tangible measures of product and location)—such factors contributed to make provision of transport an element of uncommon influence on our public policy, and a good example in both nineteenth- and twentieth-century settings of the type of unplanned and largely undirected cumulation of events which had basic shaping effect upon what law was asked to do and how it did it.

There are many profitable directions in which a broader conception of legal history might take us. I have drawn specific prescriptions from four criticisms of limitations implicit in the bulk of work so far done. In addition let me note some more general developments that would be useful. Two concern the more effective study of legal institutions themselves. Two concern particularly critical kinds of meaning which the study of legal history might have for better understanding the general course of this society.

First, as to legal institutions: (1) In times when social change moves fast, wide, and deep amid peril to the prized values of a constitutionally ordered community, we need more sophisticated knowledge of the potentials and the limits of the major agencies of law-making. If no other currents of events enforced this need, it would gain enough urgency because of the extent to which we depend upon public finance to sustain the momentum of the economy and upon foreign policy to maintain the national security. On the whole the organization, procedures, and working traditions of the legislative and executive branches represent responses to conditions which the fast pace of events has put far behind us. If there need be less concern for the adequacy of judicial organization, this is not because it lacks serious defects. However, the most important job for the courts in this highly organized modern society is not that of general policy-making but of insuring some minimum of decent procedural protection for individuals and small groups confronting large organized power. On the whole this is a task simpler enough than general policy-making so that it can be handled with what we have, if bench and bar apply their traditions with intelligence and courage. The situation is quite different as to the sufficiency of the legislature and executive before the daunting challenges of the times; the difference is reflected, for example, in contemporary controversies over the proper roles of legislative investigation, and over functions of the National Security Council or the Joint Chiefs of Staff, or in hearings and debates of the Congressional Joint Committee on the Economic Report of the President's Council of Economic Advisors. Types of public problems vary in distinctive character and challenge; types of public agency vary in distinctive capacities, whether born of formal structure and process or of tradition. Legal history should lend us more insight into the working character, promise, and limitations of formal agencies for making public decisions. (2) There is no more badly neglected area of legal research than that of sanctions, the comparative study of methods of implementing policy. Given life's infinite variety and the hard limits of social science research techniques so far available, the study of sanctions is an area in which we now stand to gain most from history. Nor should we view it as the study of factors of secondary importance. The more difficult the basic policy choices, the more surely must judgments of the promise and costs of implementation enter into the basic decisions. Moreover, we grow into some basic decisions out of experience of what we can expect to do. Sophisticated study of experience in enforcing public policy will require overleaping the limitations which have marked the bulk of legal historical writing—appraising the interplay of legislative and executive with judicial processes, relating law to the functional character of other social institutions on which it impinges, putting legal decisions and procedures into the proper perspective of the times in which they are made, weighing the positive investment of resources which the law must provide or direct to obtain desired results. It is a commentary on the failure of scholarship thus far to tackle many major problems, that, for example, in the 1960's when we confront the difficulties of building equal protection of the laws for Negroes in voting and schooling we have no studied body of experience for guidance in handling problems of large-scale hostility to public policy. If legal historians will set themselves to significant problems in legal sanctions, they will lack no longer for a more searching philosophy of their discipline; their problems will push them into philosophy.

Second, consider two respects in which a broader approach to legal history might yield insights of two types specially important to understanding the general life of the society.

(1) Because of the four key functions we have assigned to law—its scrutiny of all types of secular power, its constitutionalism, its emphasis on procedural regularity and its role in resource allocation—but especially because of law's formality (its attention to regular procedures for examining and taking decisions), law offers peculiarly important evidence of the values which give this society coherence and vitality. Of course this is not true in equal measure of all we find recorded in law; inertia and drift play their roles here, too, so that a prime job for legal history is to distinguish what has living force from what is dead or dying, deceptive or hypocritical. Granted this need of taking distinctions, legal history, just because of its relative formality, offers unusual evidence of the development of the values our people have held. Thus, study of legal history can make special contribution to the general history of ideas. The study of a people's values has basic importance to understanding a society, for it is the sharing of values that provides the bond of lasting human relations, even where (as with the value we put on the competitive processes of the market) the shared values may express themselves in secondary conflict. Study of the growth of shared values has special importance not only for understanding this particular society, but for contributing to its strength. We have grown fast amid a great bustle of events and subject to major discontinuities in the emergence of new relations of power and process. We need to know ourselves in our strengths and failings much better than we do. There is evidence of this need in the uncertain allegiance which common opinion has shown under stress even to such traditional values as those of the Bill of Rights. A broader concern with legal history as an avenue to study of ideas will bring this discipline into relation to the most fundamental kinds of social analysis as well as into relation with the most critical living problems of our own generation.

(2) Because legal processes and legal records bulk large among ways in which we bring values to definition, a broadly conceived legal history could help us come to terms with the good and the bad features of the pragmatic attitudes that are so central in this culture. Our actions show that we have believed that within a framework of generalized values men must make meaning for themselves, in a universe whose baffling detail and sweep favor drift and inertia as the norm of men's experience. In this light the main theme of man's history is the cultivation of his awareness and of his capacities of mind and will to act upon his greater awareness of his situation. We need to strive to see, and to learn what our creative possibilities are by striving to act upon what we see. The experimental and activist bias of our culture rest upon these valid insights. On the other hand, our preoccupation with directed effort and what it teaches has led us also into a bias toward exalting the immediately practical—in the sense of knowledge which can be translated into immediate operations—at the expense of understanding larger causes and more remote chains of effects. Thus a valid pragmatism is constantly at war with an illegitimate pragmatism in our way of life. Because it brings so much focused effort to bear upon making choices and counting gains and costs, legal process offers rich tangible evidence of these

warring brands of pragmatism in our common life. For example, the history of our worship of the fee simple title to land—in its fruitful relation to the development of civil liberty on the one hand, and its unfortunate relation to the waste of natural resources on the other—could be told in ways to show how legal history might illuminate the sound growth and also the distortion of pragmatic values in this society. If the cultivation of awareness is the basic theme which expounds man's most distinctive life role, the most characteristic functions of our legal order—its scrutiny of the arrangements of power, its insistence on the responsibility (constitutional status) of legitimate power, and on procedural regularity, and its uses for resource allocation—point to the intimate relation which the imaginative study of legal history should have to the study of general history.

Implicit in what I have said in appraising some approaches to legal history is the notion that we should study history to learn more about realizing life's possibilities. History itself will teach us not to hold a naive faith that men readily learn from history. Moreover, the view I take of man means that there is no need to apologize for studying history partly because there is pleasure in the effort; the enjoyment lies precisely in man's nature, for his life consists most distinctively in his consciousness. But writing and reading history are more than aesthetic experiences. They are themselves kinds of activity which constitute man's distinctive being, which consists in his response to and rebellion against the challenges of an impersonal universe. It is in this sense that legal history research and writing stand under the functional command to serve the growth of our philosophy.

19

QUANTITATIVE METHODS FOR JUDGES, LAWYERS AND LAW TEACHERS

Maurice Rosenberg

Like it or not, quantitative research has arrived as one of law's resources. True, lawyers as a breed have not jumped at the chance to leave the library for the field, perhaps because their training teaches them to mistrust data that are not collected under adversarial rules of inquiry, perhaps because they are convinced that truth lies in thinking, not counting. Whatever the profession's reasons, law schools must break free from the traditional bonds.

As the years pass the law becomes more quantitative in its approach, not because it becomes less concerned with qualitative matters, but because it apprehends more fully that beneath the colliding value judgments of which legal rules are compounded, there lurk many empirical judgments which are largely untested and may be largely untrue. Holmes foresaw the trend over a half century ago when he said, so perceptively, that although it is true that the law is full of problems of social value and that values are hard to quantify, it is the job of the law to measure the force of competing social values as precisely as it can. Since then it has slowly become possible to measure a bit more precisely the intensity of the social policies that are the dynamic stuff of the law. The reason is that over time both the "hardware" (instruments such as computers) and the "software" (social research theory) have been greatly improved. As they get still better, they will help the law still more. Quantitative methods in aid of law have across-the-board potential.

For lawmakers, including judges, these methods help to formulate more realistic norms, to test their impact, and to assess the effectiveness of sanctions for their violation. "Look before you legislate" is a watchword increasingly, if still imperfectly, observed by legislatures. In their looking ahead they depend more and more upon experts in the relevant behavioral sciences. A less common practice is for lawmakers to look *after* they legislate —to audit the impact of statutory prescriptions upon the conditions and practices they are designed to regulate—but even here there are hopeful signs of change.

Courts too are becoming more hospitable to the behavioral scientist and his quantitative methods, particularly in the forensic fact-finding process. In the trial courts opinion surveys and other types of evidence from the field are used increasingly to determine "mass facts." The leading example is in unfair-competition cases in which claims are made of public confusion because of similar-sounding or similar-appearing brand names and packaging. Time was when courts speculated as to the impact on the buying public; now they take evidence.

In the appellate courts quantitative research has an untapped potential. Often the appellate judges' task is to predict the effect of the impending decision upon desired or detested human behavior. For example, does upholding the privileged status of husband-wife communications promote confidentiality and good spousal relationships? Does the contributory-negligence rule induce greater care in driving? The list of such questions is endless, and without empirical research the appellate courts would continue to answer them by hunch and guesswork as they have from the dawn of common-law judging. Particularly is this true in the legions of negligence actions that preoccupy the civil courts throughout the country. In these cases the typical problem is to determine whether the defendant's conduct fell below a vague community standard which the law labels "reasonable." Often the jury has answered "yes" to that question and the appellate judge's task is to decide whether the jury's answer is legally permissible. He knows, as Holmes wrote, that such an issue—"the tendency of a given act to cause harm under given circumstances"—must be determined by referring to the community's experience; that is, according to the probabilities. That is obviously a call for quantitative data. In all these matters the courts need a depositary of scientifically gathered quantitative data and a mechanism for judicial notice to make the data accessible.

For the practicing lawyer, quantitative methods have the same types of uses as for the trial courts in relation to proof of mass facts, and the bar more and more uses them for such purposes. Still neglected by the bar are the accumulating insights of social psychologists about factors which predispose jurors to sympathy or animosity, to generosity or niggardliness, which help or hurt in persuading them, etc. When trial lawyers become aware of what science has been learning about patterns of human behavior and attitude, they will be in a better position to select congenial jurors, improve techniques of persuasion and, in general, do a more professional job in the courtroom.

For law teachers, quantitative methods open the door to new insights and new approaches. An immediate gain is in sharpening the outlines of fuzzy or dimly understood legal concepts. A personal experience recently drove this home for me. At Columbia we are engaged in a field survey of the day-to-day operations of discovery procedures under the Federal Rules. One question of importance is why lawyers in the federal cases we were studying had chosen to use discovery procedures. There were two obvious possibilities suggested by the discovery rules themselves: to get evidence and to get leads to evidence. But as we worked at designing comprehensive questionnaires to test their motives more precisely, we constantly saw new possibilities in the question. We ended up with a list of nineteen potential reasons and the conviction that we had not yet seen all the major possibilities. In my opinion the job of reducing legal concepts to quantitative form lends precision to a law teacher's thinking in the same way that formulating questions for cross-examination helps a trial lawyer know his case better.

If for no other reason than that they sharpen the law teacher's insights, quantitative methods should receive a warm welcome in law schools. A moment's thought, however, should make clear that all the major aims of legal education will be furthered by bringing quantitative methods into the curriculum. Those aims, I believe, are three: (1) to train students of the law for effective, responsible, professional careers; (2) to advance knowledge and understanding of legal institutions; and (3) to improve the law and the administration of justice. On the basis of what was earlier said about the ways in which quantitative methods can aid lawmakers, judges, lawyers and law teachers, it seems self-evident that each of these objectives will be advanced by teaching students the methods and potentials of quantitative research.

To be sure, those methods have important limitations: tremendous expense in manpower, time and money; the serious handicap of lack of scientific controls in most field-research undertakings; and a depressing shortage of trained personnel. At Columbia we have taken a step to rectify the supply problem by introducing a training program at the graduate level for law-sociology professionals under a grant from the Russell Sage Foundation.

In urging that quantitative methods be brought into the law school's curriculum, I do not mean that full-scale courses should be offered immediately. It seems to me that Professor Ball was right to suggest that quantitative methodology needs to be fed to law students with a small spoon, not a shovel. If law teachers in some of the many fields where quantitative methods have important implications can be informed of these implications—for example, by a summer program that in part attempts to exemplify the use of these methods in teaching contracts, torts, procedure, etc.—the job will be well begun. Then each teacher may in his own way devote classroom attention to the utility of these methods for his specialty. In time, no doubt, there will be good reason to introduce full-scale courses in quantitative methods as the demand grows for integrated teaching of the subject.

Quantitative research is the means by which lawyers may move from guesswork toward knowledge in ascertaining the impact of law in action. In the process the lawyer will be compelled to think harder and with more precision than he is used to about the law and its basic elements. The job will not be easy. For one thing, while measurement is more exact than guesswork, it is also more exacting. For another, contrary to some of the inflated claims made for it, quantitative research does not give iron-clad "answers" to the tough questions it investigates. It usually produces no more than evidence. But lawyers above all should be sympathetic to that sort of limitation, for their daily fare is probability, not absolute truth.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF FORDHAM UNIVERSITY AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, et. al.	CASE NO. 2-RC-15500 CASE NO. 2-RC-15507

AMICUS BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

Counsel for the Association of American Law Schools

Walter Oberer
Cornell Law School
Ithaca, New York 14850

Robert A. Gorman
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Alvin L. Goldman
University of Kentucky College of Law
Lexington, Kentucky 40506

Of Counsel.

Brenda Hamer
Lexington, Kentucky

CONTENTS

Page

I. Appearance 1

II. Statement of Issue and Position 1

III. The Amicus Party 2

IV. The Separate and Unique Character of Law Faculty Status . . 3

  1. Law Faculties are Not a Necessary Structural Dimension of a University 3

  2. Law Faculties Use Separate Facilities 4

  3. Separate Academic Calendar for Law Faculty. 5

  4. The Law School is Traditionally an Autonomous Unit . . 6

  5. Law Faculty Are a Separate Breed. 8

  6. The Part-Time Law Teacher 15

  7. Law is Taught Differently 16

  8. Law Faculties Teach A Separate and Unique Student Body 18

  9. Unique Demands of Law School Curriculum 24

  10. Law Faculty's Special Concern Respecting Library Facilities 27

V. Argument 29

  1. Preliminarily 29

  2. Applicable Criteria 31

    (a) Lack of Functional Integration 31
    (b) Separate Sense of Identity 32
    (c) Physical Proximity of Work Situs 33
    (d) Degree of Unit Autonomy. 33

  3. Application of the Criteria 34

    (a) Lack of Functional Integration 35
    (b) Separate Sense of Identity 36
    (c) Physical Distinctiveness and Separation of The Work Situs 38
    (d) Degree of Unit Autonomy 39

  4. Dangers Inherent in Immersing the Law Faculty Within a Larger Faculty Unit 40

VI. Conclusion 43

Certificate of Service 44

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF FORDHAM UNIVERSITY
AND AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS, et. al.

CASE NO. 2-RC-15500
CASE NO. 2-RC-15507

AMICUS BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

I.
APPEARANCE

The Association of American Law Schools (hereinafter "AALS" or "the Association") hereby makes its amicus appearance.[1]

II.
STATEMENT OF ISSUE AND POSITION

The sole issue discussed in this amicus brief is whether law faculty should be in a representational unit separate from the rest of the university faculty in Board conducted elections. As set forth below, it is the position of the AALS that the Board should adopt a policy of preferring to place law faculty in a bargaining unit separate from other university faculty.

This brief will demonstrate that the law faculty's sense of identity and community of interests are separate and apart from that of the rest of the faculty. It will show that, in comparison with other faculty, the law teacher comes from a different type of academic and work experience background, conducts himself in a manner which reflects his special responsibilities to the legal profession, is rewarded under separate promotional and salary criteria, teaches a very unique group of students, utilizes distinctive teaching methods, and operates within a different type of curriculum. In all of these matters, law teachers share problems which are very different from those which confront other faculty. Moreover, as is discussed below, the law faculty works within an essentially self-governing unit in a separate physical facility, utilizes independent and unique research resources, and maintains close links to the practicing profession.

---

[1] The AALS was notified by a letter dated April 12, 1971 from Howard LeBaron, Associate Executive Secretary, that leave to appear amicus has been granted.

In light of these circumstances, it is evident that the purpose of the Act, the traditional relationships within the university, and the welfare of legal education and the legal profession, are best served by finding that law faculty are in a separate voting unit.

III.
THE AMICUS PARTY

The Association is an independent, non-governmental, non-profit association of schools of law. The central purpose of the Association is the improvement of the legal profession through legal education. It has operated since 1900 as an unincorporated association of law schools admitted to membership upon application and demonstration of qualification under the terms of published Articles of Association and Executive Committee Regulations. AALS standards of accreditation are administered and maintained through a system of visitations made to member law schools. In the foregoing manner the Association operates as one of two recognized agencies for the accreditation of schools of law in the United States. Of the approximately 165 law schools in the country, 124 are accredited by the AALS.

The Association is governed by the member law faculties at its annual meeting. The Executive Committee, which consists of a President President-Elect, and four committee members all elected by the annual meeting from the member faculties, conducts the affairs of the Association between annual meetings and has the power to interpret and implement the Association's requirements. The administrative affairs of the Association are entrusted to the Executive Director, a full time staff position.

The AALS Executive Committee has recently engaged in a review of the relationship of law faculties to collective bargaining activities amongst university teachers. As a result of its deliberations on this matter, the Executive Committee, on behalf of the Association, has taken the position that in most situations it would be unwise and unfortunate to include the law faculty in a university-wide bargaining unit. Accordingly, the Association urges that in shaping collective bargaining units for university faculties, the Board should adopt a policy of preferring that law faculties be placed in a bargaining unit separate from other university faculties.

IV.

THE SEPARATE AND UNIQUE CHARACTER OF LAW FACULTY STATUS

The specific characteristics of membership on a law faculty will vary somewhat from school to school. Nevertheless, as the information and discussion below demonstrate, there are basic similarities in faculties throughout the nation's law schools and by examining these similarities, it becomes readily apparent that law teaching is a singular experience, in a unique environment, requiring special background, training, and skills, and operating through its own form of corporate governance. Accordingly, law faculty status is characteristically very different from any other type of faculty position and, therefore, as more fully discussed in the "Argument" portion of this brief, law teachers have a separate community of interest apart from that of other university teachers.

1. Law Faculties Are Not A Necessary Structural Dimension of a University. -

An American university characteristically focuses its central attention upon undergraduate programs in the liberal arts and sciences and upon graduate level programs in the science and humanities disciplines. Normally, there is considerable integration and coordination amongst these programs and the faculties responsible for them. This high degree of interrelationship will sometimes extend to a professional program such as engineering or architecture, where that program involves basic science or humanities teaching offered elsewhere in the university. Although a law school enriches a university, unlike the typical academic unit the law school is not a necessary and integral part of a university, nor is interrelationship with a university a necessary and integral part of operating a law school. Accordingly, a number of prominent universities, such as Princeton, Brown and Dartmouth, do not have a law faculty. Similarly, although location on a university campus certainly enhances the facilities available to a law faculty and law students, a few accredited law schools have no university affiliation,[2] and a number of well established law schools are located a considerable distance away from their main university campus.[3]

2. Law Faculties Use Separate Facilities. -

The distinctivenessof the law faculty and law program is also manifest in the fact that almost all accredited law schools are housed in wholly separate facilities even when they are part of the campus common to undergraduate, graduate and other professional school programs. It is both appropriate and desirable that the law school be separately housed. As demonstrated below, its program, faculty and student body operate as an autonomous unit. Accordingly, under Article 6 of its Articles of Association, the Association takes the position that it is highly desirable that a law school be housed in quarters exclusive to its use with separate offices therein for each full-time teacher and for the law librarian, and with special attention given to that part of the structure which houses the law library.[4] With but few exceptions, the physical facilities of accredited law schools fully comply with the Association's above described policy

---

[2] E.g., Dickenson School of Law and Detroit College of Law.

[3] E.g., University of Connecticut College of Law, University of Denver College of Law, Georgetown University Law Center, Northwestern University School of Law.

[4] §9(a) · Approved Association Policy Under Article 6. See AALS, Proceedings of 1965 Annual Meeting, Part Two at P. 116.

5

respecting an adequate physical plant.

3. Separate Academic Calendar For Law Faculty. -

Law school programs most often operate on their own academic calendar, independent of the academic calendar for the rest of the university. Thus, examination of the academic calendars for a random sample of accredited law schools[5] shows that the Fall semester starting date does not coincide with the university calendar starting date in eleven out of the seventeen university affiliated law schools in the sample. From this data we can project that about 65% for the total population of accredited law schools operate under an academic calendar which is separate from that for the rest of the university.

---

[5] To facilitate the collection of data, where published composite data is not available, the relevant information has been compiled for this brief using a random sample of accredited law schools. The sample was randomized by selecting every seventh school listed in the alphabetical listing of AALS accredited law schools contained in List I of the AALS Directory of Law Teachers: 1970. The resulting sample consists of: University of Alabama, School of Law; Boston College Law School; Case Western Reserve University Law School; University of Connecticut School of Law; Detroit College of Law; Florida State University College of Law; Howard University School of Law; University of Kentucky College of Law; Marquette University Law School; University of Missouri-Columbia, School of Law; University of North Carolina School of Law; University of Oregon School of Law; St. John's University School of Law; University of South Carolina School of Law; Temple University School of Law; University of Utah College of Law; Washington and Lee University School of Law; and the University of Wisconsin Law School.

If this random sample has a weakness, it is in the absence of any of the large, prestigious law schools such as Berkeley, Chicago, Columbia, Harvard, N.Y.U. Michigan, Pennsylvania or Texas. For the purpose of this brief, however, that absence merely increases the significance of the resulting data inasmuch as the large prestigious law schools have traditionally had, and still have, the maximum degree of institutional and faculty autonomy.

4. The Law School is Traditionally an Autonomous Unit. -

When a collective bargaining unit for university faculty was certified a year ago by the New York State Labor Relations Board pursuant to a consent election agreement, the law school was excluded from the university-wide unit.[6] The consent agreement in that case was an appropriate recognition of the traditional autonomy exercised by law faculties within a university. "The schools of the older professions, such as medicine and law, usually have the greatest autonomy." [7] "Autonomy gives a school control of its curriculum and its students, status in the University, and influence on university policy. . . . Because of age and prestige, the law schools have often had a high degree of autonomy."[8] The areas of law school autonomy within a university have elsewhere been catalogued as including the conducting of separate fund drives, autonomous law library operation, independent control over teaching load level for law faculty, self-determination of faculty appointments and changes in faculty status, and a separate compensation schedule.[9]

This tradition of law school autonomy is strengthening with more of the critical prerogatives moving from the presiding officer within the law school to the corporate entity of the full-time law faculty.

---

[6] St. John's University, N.Y.S. Lab. Rel. Bd., Dec. No. 12630, Apr. 22, 1970.

[7] W. McGlothin, The Professional Schools at p. 63 (1964).

[8] W. McGlothin, Patterns of Professional Education at pp. 174-175 (1960).

[9] J. White, The Law School and the University Administration, 1969 U. Tolo. L. Rev. 395, 402-403.

> On matters of educational policy and increasingly on matters of administration, law schools are in large measure self-governing, with authority centered in the deans and full-time faculty members. The trend is toward the power of the deans to decline vis a vis the faculty, and in many schools, student admission, curricula, faculty appointments and promotions are among matters effectively controlled by the full-time faculty rather than the law school deans or others in the university power structure. For the most part, however, it is the individual teacher who determines how and what he will teach in the courses assigned him and he personally prepares and grades examinations in his courses, with no review of the grading process by others.[10]

Law school self-governance is more than a tradition or expanding historic development. It is a standard for AALS accreditation. Article 6, section 4 of the Association's Articles states that a law faculty shall be "vested with primary responsibility for determining institutional policies." The statement of approved policy under this heading explains that: "Upon the full-time faculty members rest the major burden of planning and executing the institution's instructional work." [11]

Specific provisions in the Association's Approved Policy describe the requirements of law faculty autonomy in terms of the faculty's exercise of "a substantial degree of control over decanal and faculty appointments or changes in faculty status." [12] A typical illustration of this last aspect of law school autonomy is provided by a recent survey in which 75% of the law schools reported that their promotion policy differs from that of the general university policy and that in a majority of the institutions the law school's promotion recommendation either bypasses a general university promotion committee or receives pro forma approval by such a committee.[13]

---

[10] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 49 (1967).

[11] Approved Association Policy at Article 6 §4(b). AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 161.

[12] Approved Association Policy at Article 6, §4(c) in AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 162.

Approved Association Policy also states that a member school should have wide discretion to identify its goals, formulate its program, determine its program financing needs, make its own presentations to the principal university officer, seek advice and assistance from outside groups and individuals, and raise funds outside of university sources.[14]

5. Law Faculty Are A Separate Breed. -

Law teachers differ considerably, as a group, from other university teachers. The law teacher has a characteristically different type of academic background, is recruited from a different manpower source, has a different orientation to the non-academic world, is compensated at a different level, and advances through the academic ranks at a different pace.

Law faculties are generally recruited from amongst the practicing profession rather than directly out of the academic environment.[15] Thus, a check of our sample of law schools shows that at least 60 percent of the full-time teachers in accredited schools engaged in professional employment outside the university between receiving their law degree and entering upon law teaching.[16] With a few exceptions, all law teachers are admitted to practice law in one or more jurisdictions.[17] In contrast, the general supply of new university level teachers "consists largely of students receiving graduate degrees."[18] Indicative of this difference in career pattern is the fact in the 1964-1966 period over 60% of the doctorate recipients in all fields went directly into college and university teaching.[19]

---

[13] AALS, Proceedings 1968 Annual Meeting, Part Two at pp. 198-199.

[14] Approved Association Policy at Article 6 §5 in AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 163.

[15] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 48 (1967).

[16] AALS, Directory of Law Teachers. 1970. The sample used is described in footnote 5. It is believed that the percentage is actually even higher inasmuch as some faculty may have neglected to list their prior practice experience in the biographic sketch.

373

Moreover, the academic training of law teachers is markedly different from that of university teachers generally. Normally, in university teaching the research doctorate degree is a prerequisite to full professorial recognition. Although it is possible to secure a research doctorate in law, that degree does not play a significant role in preparation for law teaching. Rather, the normal expectation for academic preparation in law teaching is the professional degree - the J.D. or LL.B. Thus, whereas 52.7% of all full-time university teachers hold research doctorate degrees, only 8.8% of the full-time teachers in our random sample of accredited law schools hold the research doctorate.[20]

This distinction in academic preparation can be seen in the differences in the duration of academic preparation as well as in the differences in the style of the preparatory programs.

---

[17] Q. Johnstone & D. Hopson, supra at p. 49.

[18] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupation Outlook for College Graduates at p. 179 (1970-71 ed.).

[19] U.S. Dep't. of H.E.W., The Education Professions - 1968, Table 65 at p. 342.

[20] U.S. Dep't. of H.E.W., Digest of Education Statistics: 1970 at p. 82; AALS Directory of Law Teachers: 1970 and individual school bulletins. The sample is described at note 5, supra.

Whereas the law degree is normally earned in a structured three year program, 58.1% of those in full-time university teaching did not receive their highest degree until at least five years after being awarded the B.A. or its equivalent.[21] And in more recent decades that time span has been even longer. Thus, for those receiving the doctorate during 1964-1966, the median years from baccalaureate to doctorate was 8.2 years.[22] Accordingly, whereas the young law teacher's student phase is normally behind him, many young teachers elsewhere in university teaching are simultaneously completing, or attempting to complete, their Ph.D. requirements.[23]

Promotion expectations for law teachers are quite different from those of other university teachers. Generally, university teachers are rarely promoted to full professor rank until they have their doctorate and over seven years of teaching experience.[24] Law teachers are promoted to full professor at a much earlier stage, and the research doctorate is not a prerequisite to that promotion. For example, a comprehensive study based on 1956-1957 data showed that at a majority of law schools the promotion to full professor came an average of six years after initial appointment.[25] An examination of the biographic sketches of the faculty in our sample of law schools shows that at the median law school, based on average time for promotion to full professor, the average full professor received his promotion 5.7 years after entering law teaching.[26] This difference in promotional expectations can also be seen by comparing the structural distribution of full-time faculties amongst the three professorial ranks as shown below:

---

[21] U.S. Dep't. of H.E.W., Digest of Education Statistics. 1970 at p. 82.

[22] Yearbook of Higher Education. 1969 at p. 531. The median age of male doctorate recipients in all fields in 1966 was 31.5 years. Id. at p. 534.

[23] U.S. Dep't. of H.E.W., The Educational Professions - 1968 at p. 232.

[24] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Outlook for College Graduates: 1970-71 at p. 179.

[25] AALS, Anatomy of Modern Legal Education at p. 171 (1961).

[26] The data was secured from AALS, Directory of Law Teachers. 1970 and the sample is described in note 5, above.

Rank	Percentage of All University Full-Time Faculty[27]	Percentage of Law School Full-Time Faculty[28]
Professor	27.2	57.8
Associate Professor	22.5	21.2
Assistant Professor	29.6	20.9

Comparative data does not seem to be available on the relative expectations concerning tenure. However, it is generally recognized that whereas the prospect of securing tenure is very uncertain for most young university teachers, the prospects are very high that the new law teacher will achieve tenure. Moreover, the young law teacher will receive it sooner than the teacher on some other faculty. A possible explanation for this is that law faculties are probably more rigorous than other faculties in their hiring policies.

Transfers from other academic units into law teaching are extremely rare. We can project that the sole teaching experience of over 96% of all full-time law teachers has been on a law faculty.[28a]

Law faculty can chose between teaching and practicing their profession. For this reason, their salaries are influenced by the larger market place.[29] And, because law is a well compensated profession, law teachers are paid markedly above the general university compensation levels.[30] Although specific law school salary data is not very readily available, enough information is at hand to provide a reasonably accurate portrayal of the differences between law faculty and general university compensation levels. For example, in the Summer of 1965, Professor William D. Ferguson surveyed over 2,000 law teachers concerning their level of salary. He received about a 50% response which, because the survey was self-selective, may have tended to be slightly biased toward those employed at schools with lower salaries. In any event, the average law school salary by rank, according to Professor Ferguson's survey, was $16,749 for a full professor; $12,271 for an associate professor, and $10,230 for an assistant professor.[31] The American Association of University Professors reported the following average salary, by rank, for all full-time university teachers in the 1965-66 academic year: $14,636 for a full professor, $10,665 for an associate professor, and $8,721 for an assistant professor.[32] Based on these figures, a comparison shows that the average law professor was paid 14% more than the average university professor at the full professor rank, 15% more at the associate rank, and 17% more at the rank of assistant professor.

---

[27] Distribution of Full Time University Faculty by Rank, Spring, 1969, in U.S. Dep't. of H.E.W., Digest of Educational Statistics at p. 82 (1970 ed.). A portion of the full time university faculty have less than professorial rank.

[28] Based on our previously described sample using data extracted from AALS, Directory of Law Teachers. 1970. Visiting faculty were not included with other full-time faculty for these figures.

[28a] 11 out of 303 teachers in our random sample (see n. 5, supra) had other teaching experience. Information on outside teaching is elicited for the biographic sketches. AALS, Directory of Law Teachers. 1970 at p. 8, item 8.

[29] W. McGlothlin, The Professional Schools at p. 62 (1964), D. Wollett, *The Status and Trends of Collective Negotiations for Faculty in Higher Education*, 1971 Wisc. L. Rev. 2, 18.

[30] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 47 (1967), A. Goldman, *More on the Economics of Law Teaching*, 19 J. Legal Ed. 451-452, (1967).

The differences between law faculty and general university faculty salary levels is more strikingly and more accurately demonstrated by taking the 1969-1970 average compensation (salary plus fringe benefits) and average salary figures for the law schools in our sample and comparing them with the equivalent data for the university-wide faculty at the same schools.[33] These comparisons reveal that for the 14 schools in our sample for which complete average compensation data is available, the median difference between law faculty and general faculty compensation at the

---

[31] W. Ferguson, Economics of Law Teaching, 19 J. Legal Ed. 439, 440 (1967).

[32] The Economic Status of the Profession, 52 AAUP Bull. 141, 153 (1966).

[33] The university-wide figures are shown in 56 AAUP Bull. at pp. 204-234 (1970). The law school figures are compiled annually by the American Bar Association Section of Legal Education and Admissions to the Bar and distributed to the law school deans by Professor Millard Ruud, Consultant on Legal Education to the American Bar Association.

the same university was 39%, in favor, of course, of the average law faculty compensation. At the median sample school, ranked by the size of the differential in compensation levels, the average 1969-70 law school compensation was $22,540 whereas the average university-wide faculty compensation was $16,182. The range within which the average law faculty compensation in the sample exceeded the average compensation for the campus-wide faculty at each school was from 21% to 62%. The average institutional differential of law faculty over university-wide average compensation for these same schools was 40%.

The results are similar if average salaries are compared. Complete data for this purpose is available for sixteen of the schools in our sample. These figures show that at the median institution in the sample the average law salary was 37% greater than the university-wide average faculty salary, and that the average of differentials for all sixteen schools was a 40% advantage for the law salaries. The specific figures for the median institution, when ranking the schools by the extent of average salary differential, was an average law school salary of $17,193 and an average university-wide salary of $12,531.

The range of average salary differential between law faculty and university-wide faculty for the sixteen schools was from 20% to 69%. At the institution with the highest average law salary in the sample, the average law faculty member was paid $20,929 and the average university-wide faculty member received $12,394. And, at the institution with the lowest average law salary in the sample, the average law faculty member was paid $16,263 and the average university-wide faculty member received $13,158.

The foregoing data is summarized in the following table.

TABLE

SAMPLE LAW SCHOOL vs. UNIVERSITY-WIDE FACULTY PAY SCALE

	Average Law School Compensation	Average University Compensation at Same Institution
1. Median sample school ranked by percent of differential between law school and university		
a) Amounts	$22,540	$16,182
b) Percentage Difference	39% >	
2. Average Differential in Sample	40% >	
3. Range of Differentials in Sample	21% > 62% >	
4. Highest average law faculty compensation in sample	$22,540	$16,182
5. Lowest Average law faculty Compensation in sample	$17,843	$13,153

	Average Law School Salary	Average University Salary at The Same Institution
1. Median sample school ranked by percent of differential between law school and university		
a) Amounts	$17,193	$12,531
b) Percent Difference	37% >	
2. Average Differential in Sample	40% >	
3. Range of Differentials in sample	20% > 69% >	
4. Highest average law salary in sample	$20,929	$12,394
5. Lowest average law salary in sample	$16,263	$13,158

Recognizing the clear-cut differences in law faculty pay schedules as distinguished from university-wide faculty schedules, the AALS Law School Administration Committee has initiated a project to establish AAUP type salary scale classification ratings appropriate for use by law schools.[34] That is, the AALS Committee has determined that the AAUP salary ratings are meaningless for law schools, necessitating the introduction of a special salary rating system to take care of the law schools.

One provocative observer summed up the status of the law faculty on a university campus by calling it "an odd group." Pointing out that because the law schools are small, law teachers know each other, he states "[T]hey get on well with each other; and they tend not to know people on the other faculties of the university."[35] In a similar vein, David Riesman, while criticizing law teachers for their "self-preening complacency," adds:

> But there's a nice thing about law schools. I was a full professor of law at the age of twenty-seven. It's the opposite extreme from the British and German system of a chair, or from the way things work at the faculties of arts and sciences.[36]

6. The Part-Time Law Teacher. -

The part-time law teacher is normally a full-time practicing lawyer or judge who additionally engages in part-time instruction, usually in the field of his practice speciality.[37] Often they are employed to fill temporary vacancies on a staff; other times they are hired for their expertise in a particular narrow speciality in which no one on the full-time faculty has a teaching interest.[38]

The presence of a few part-time law teachers provides one of the several important links normally found between the law faculty and the practicing bar.[39] Similarly, the presence of these judges and practitioners helps to promote a sense of professional identity on the part of the students.[40]

---

[34] AALS, Proceedings, 1968 Annual Meeting, Part Two at p. 1[illegible]7.

[35] M. Mayer, The Lawyers at p. 116-117 (1966).

[36] Quoted in M. Mayer, supra at p. 117.

[37] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 49 (1967).

[38] Q. Johnstone & D. Hopson, supra.

7. Law is Taught Differently -

Law school teaching is different. Course content is largely dependent upon the individual teacher. Thus, Professor Charles Kelso can report that when he was a student he took Constitutional Law three times and Jurisprudence four times - from different instructors - and each time it was different.[42]

While a wide variety of techniques are used, the case method and casebook still provide the central approach to teaching law.[43] The first year law student must go through a period of adjustment to the methods of instruction and the techniques of law study.[44] Despite the resulting anxieties, law teaching is unusually successful in generating student enthusiasm in the first year.[45] It has often been asserted by non-law teachers that "What the law professors offer in their courses is the best quality of education in America.[46]

On the other hand, law students generally enter upon a period of boredom and intellectual and professional restlessness in their second and, especially in their third year.[47] This pattern poses a special problem for the law faculty and greatly influences decisions concerning program design, teaching technique, and the propensity for curriculum innovation.

---

[39] AALS, Anatomy of Modern Legal Education at pp. 338-39.

[40] AALS, Report on the Study of Part Time Legal Education in Proceedings, 1969 Ann. Meeting, Part One at pp. 5, 43.

[42] C. Kelso, Curricular Reform for Law School Needs of the Future, 20 J. Legal Ed. 407, 408 (1968).

[43] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 51 (1967); A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 121 (1968)

[44] Anxiety and the First Semester in Law School, 1968 Wisc. L. Rev. 1201, 1202, 1204.

[45] S. Warkov & J. Zelan, Lawyers in the Making at p. 73 (1965) H. London & A. Lanckton, Why Teaching is Better in Law Schools Education Record, Fall 1968 at p. 444.

[46] M. Mayer, The Lawyers at p. 118. Also, W. Johnston, Teaching in The Law School, 37 J. Higher Ed. 159 (1966). And see previous footnote.

[47] See, e.g., P. Savoy, Toward A New Politics of Legal Education, 79 Yale L.J. 444, 446 (1970); D. Robertson, Some Suggestions on Student Boredom in English and American Law Schools, 20 J. Legal Ed. 278 (1968); A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 141 (1968).

Law teachers are probably more introspective than any other group of university faculty respecting teaching technique and curricular organization and are forever reexamining these problems at meetings, in the Journal of Legal Education, with alumni, and in the law journals. For example, at least one observer attributes the upper classman's boredom to the pedagogical techniques emphasized in the first year of law school.[48] Others have urged the expansion of clinical programs as a means for revitalizing student interest[49] and still others have suggestions for yet different approaches.[50] Whatever the proposals, though, law teachers recognize their common interest in resolving their unique problems of pedogogy. And, in this connection, the AALS and other organizations are engaged in active programs designed to improve the techniques of law teaching. These efforts include the Association's summer teacher clinic, the summer institute for law teachers on social science method in legal education, the continuing surveys and reports of the AALS Committee on Teaching Methods, the former N.Y.U. summer institutes for law teachers, and the conferences and publications of the Labor Law Group Trust.

The examination technique by which law teachers test student achievement provides still another area in which the law school is a very singular institution. Law students are examined less frequently but more comprehensively than are students in most other parts of a university. The resulting examination papers take an extraordinarily long time to grade, a responsibility which can be borne only by the law teacher.[51] This, too, helps make law teaching a distinctive type of function.

---

[48] A. Watson, The Quest for Professional Competence, supra at p. 137.

[49] E.g., J. Ferron, Goals, Models and Prospects for Clinical Legal Education, in Clinical Education and the Law School of the Future at p. 94 (Kitch ed. 1970); A. Fortas, The Training of the Practitioner, in Haber & Cohen, The Law School of Tomorrow at p. 179, 186-192 (1968).

[50] E.g., R. Gorman, Legal Education Reform: A Prospectus, 16 Student Law 8 (May 1971), R. Alleyne, Creative Legal Research Relevant Uses for an Old Law School Curriculum, 20 Buff. L. Rev. 459 (1971); P. Savoy, Toward a New Politics of Legal Education, 79 Yale L.J. 444 (1970); E. Mooney, The Media is The Message, 20 J. Legal Ed. 388; C. Kelso, Curricular Reform for Law School Needs of the Future, Id. at 407 (1968).

8. Law Faculties Teach a Separate and Unique Student Body. -

The character of the student body is an important factor in shaping program content and teaching technique. A distinctive student body, therefore, poses distinctive problems respecting the central aspect of a teacher's activities.

Undergraduate, and to some extent graduate and other professional school programs, normally deal with a common student body. In contrast, law faculties deal with a separate and singular student body. For example, on the average each school in our random sample of law schools, referred to above, drew students into its first year class from 64 different undergraduate institutions - the median school drawing its student body from 52 institutions.[52] As a result, the parent university's undergraduate admissions policies, curriculum, facilities, and programs bear very little relevance for the law school.

Not only does a typical law school student body come from a large number of other campuses, it also is separated and distinguished from the main body of students in other ways. For example, law students come from highly varied academic backgrounds with the result that, unlike teachers in most graduate and professional areas, the law teacher cannot depend on the students sharing a common pool of skills or knowledge.[53] The law student is a separate type in terms of sociological background as well. Thus, a study has shown that law students come in disproportionately high numbers, in relationship with the overall student population, from families in which there is a lawyer parent,[54] and

---

[51] A. Watson, *The Quest for Professional Competence*, 37 Cinn. L. Rev. 91, 160 (1968).

[52] AALS-LSATC, 1970/71 Pre-Law Handbook at pp. B(1)5 - B(1)22 (Bobbs-Merrill ed.). The sample is described in note 5, above.

[53] A. Watson, *The Quest for Professional Competence*, 37 Cinn. L. Rev. 91, 98 (1968).

[54] S. Warkov & J. Zelan, Lawyers in the Making at p. 43, 52 (1965).

that religious background and prior academic performance are additional key factors in career choice for law.[55]

Similarly, racial minorities are absent from law schools in disproportion to the overall university student population.[56] Because of this, law faculties have an exceptional need to focus upon the socio-cultural dimension of student recruitment. Accordingly, numerous efforts have been undertaken by law faculties to alter the law student "mix" and there is considerable debate amongst law teachers, as the persons responsible for making such decisions, concerning how that goal can best be achieved.[57]

Law teachers are, additionally, confronted with the problems arising from the fact that the law student has a distinctive set of attitudes and values which set him apart from the undergraduate student, the graduate student or the student in some other professional school. Studies show that, to a distinguishing degree, law students identify with making money, helping others and being socially useful. In contrast with other university students, the law student tends to reject originality, creativity and a gradual, secure road to success.[58] In addition, those who have studied law students in comparison with other students report that law students feel an exceptionally strong need to find order in our social system and to shape aggressive drives.[59] Moreover, it is reported that law students have had particular childhood relations with their parents and others, distinguishable from the childhood experiences of those enrolled in other sorts of professional programs.[60]

---

[55] Id. at p. 45, 52, C. Campbell, The Attitudes of First Year Law Students At the University of New Mexico, 20 J. Legal Ed. 71, 72-73 (1967).

[56] AALS Minority Groups Project Report, 1965 AALS Proceedings, Part One at p. 171; E. Carl, The Shortage of Negro Lawyers, 20 J. Legal Ed. 21 (1967).

[57] See, e.g., Reports of Council on Legal Education Opportunity. Also, AALS Statement before the Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Annual Meeting, Part One at pp. 49, 55-60; Symposium, Dis-Advantaged Students and Legal Education, 1970 U. Tol. L. Rev. 277; L. Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. Pa. L. Rev. 351 (1970); D. Bell, In Defense of Minority Admissions Programs, id. at 364; Symposium, Minority Students in Law School, 20 Buff. L. Rev. 423 (1971); Comment, id. at 473.

[58] S. Warkov & J. Zelan supra at p. 12.

[59] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 93, 103 (1968).

Further, law teachers must resolve both the special opportunities and the special difficulties which result from the fact that entering law students display, as a group, an exceptionally high level of cynicism toward human conduct. By his senior years, the law student's level of cynicism is considerably reduced. Conversely, law students enter upon their education with a weaker orientation toward humanitarian values than they have at the end of their legal education. (Different attitudinal levels and directional changes have been found respecting the professional educational experience in medicine and nursing.) The two clinical psychologists who made these findings concluded that: '[L]aw training for the majority of students facilitates a generally humanitarian outlook, with some stabilization in attitudes, accompanied by a decrement in hostile and cynical feeling and expression. There is retained, however, some, perhaps an importantly large, degree of cynicism in the average lawyer personality.'[61] It is clear, therefore, that law teachers have some success in attaining their goal of improving the legal profession through legal education.

Law school appears to have another professionally oriented attitudinal impact upon the student body. Legal education may improve the student's attitude toward the desirability of law practice. For example, a study shows that while about 20% of entering law students do not have career plans in law, by the end of their first year of legal education a clear majority of that group shift their career goals and plan to be lawyers.[62]

---

[60] B. Nachmann, Childhood Experience and Vocational Choice in Law, Dentistry, and Social Work, 7 J. Counsel Psych. 243 (1960).

[61] L. Eron & R. Redmount, The Effects of Legal Education on Attitudes, 9 J. Legal Ed. 431, 443 (1957). For a discussion of the law teacher's impact upon the student's conceptualization of what the law ought to be, see, R. Keeton, Law Reform and Legal Education, 24 Vand. L. Rev. 53-56 (1970).

[62] J. Zelan, Occupational Recruitment and Socialization in Law School, 21 J. Legal Ed. 182, 196 (1968).

Significant differences have been found by researchers between the personality type characteristics of law students and the personality type characteristics of other university students. "In particular, the greatest difference was defined by the Thinking-Feeling scale. 72% of the law students were 'thinking' types whereas 54% of the liberal arts undergraduates were 'thinkers'. Other highly significant differences were found on one or more of the dichotomous scales between law students and medical, business, science and engineering students."[63] Law school was found to be exceptionally attractive to students whose personalities can be characterized as dependable and practical, having a realistic respect for facts, an ability to absorb and remember great numbers of facts and to cite cases to support their evaluations, and a tendency to emphasize analysis, logic and decisiveness.[64]

These findings have significance far beyond predicting vocational choice or merely describing the character of the typical law student. Comparison of personality information and law school performance, for example, shows that the "feeling" type student dropped out of law school with twice the frequency of the "thinking" type and, by refining the depiction of particular student personality types, we find that some types drop out of law school with four times the frequency of others.[65] The special significance which this information has for the law teacher becomes evident when one considers the law school's responsibility in providing manpower resources for the bar. Experts have suggested that the admissions, teaching, testing and curricular practices of law schools are largely responsible for these personality patterns.[66] Accordingly, in making such choices respecting admissions, teaching, testing, and curricular policies, the law teacher, as a bar member, must weigh the character and needs of the profession and the profession's responsibilities to our society. Whether the best choices have always been made in these matters is subject to debate, and is vigorously debated amongst the law teaching profession. Nevertheless, these problems must be resolved and pose another unique facet of the law teacher's responsibilities.

---

[63] P. Miller, Personality Differences and Student Survival in Law School, 19 J. Legal Ed. 460, 465-466 (1967).

[64] Id. at p. 466.

[65] Ibid.

Yet another special characteristic of law students which generates special problems for the law faculty is the overall lack of financial assistance for law students. Law students "have been singularly starved for adequate financial assistance to meet the high cost of attending three years of study required for completion of the first professional degree. Unlike the health and other sciences . . . and a wide variety of humanistic disciplines for which graduate students have been able to receive. . . assistance, students in law have, for the most part, been required to rely on loans and work-study where institutional funds have not been adequate to meet their needs."[66a] The financial burden of law students is comparable to the situation faced by undergraduates with this crucial distinction - the law student has already accumulated the debts of his undergraduate education. This dilemma creates pressures on the student to attend on a part-time basis or to carry both a full-time student load and a heavy employment schedule. Whatever the choice, the result has a serious impact on classroom preparation and curriculum scheduling. Also, this burden falls most heavily upon the law school's ability to recruit minority group students. Further, this situation results in scholarship and loan programs usually taking first priority in the law school's fund raising endeavors *vis a vis* outside resources.

---

[66] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91 (1968); Freedman, Testing for Analytic Ability in the Law School Admission Test, 11 J. Legal Ed. 24 (1958).

It has been said that: "Law students tend to live together and eat together; like medical students, they form a separate caste at a university. They work hard. . . . Law schools try to fill extracurricular time with law related activities . . .and professors stress the importance of talking over the day's work with fellow students."[67] Recognizing their mutuality of interests, law students have long separately represented those interests through their own student body organization - the student bar association. Starting in the late 1940's, law students nationally declared their separate identity by establishing the American Law Student Association. The stature of that national source of identity was increased in 1967 with ALSA's absorption into the newly created Law Student Division of the American Bar Association.

[66a] Statement of AALS to Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Annual Meeting, Part One at p. 55.

[67] M. Mayer, The Lawyers at p. 96 (1966).

Moreover, the law student spokesmen have been active advocates of law student concerns.[68] For example, the efforts of these student groups were probably a principal factor in the transition of the first degree in law from the LL.B.to the J.D.[69] Student bar efforts have also played a significant role in increasing the legal services programs at law schools.[70]

9. Unique Demands of Law School Curriculum. -

A law faculty is faced with unique curriculum, syllabus, and personnel problems due to the fact that the law school is preparing the bulk of its students for entry into the legal profession. For example, there is great concern among law faculties respecting the best approach to providing students with an appreciation for high standards of professional responsibility. "Students expect to be taught to behave like lawyers. . . . They will also be interested in understanding what 'ethical behavior' consists of, though they cannot yet define what they mean by it."[71] A major conference on this topic was held in 1956 and another in 1968.[72] Similarly, almost every volume of the Journal of Legal Education has carried at least one article discussing the place of professional responsibility materials in the law curriculum. This issue is often tied into another special concern of law teachers - the utilization of clinical experiences in legal education.

---

[68] See, e.g., Law School Newsletter, 15 Student Law. 30, 33, 36 (Mar. Apr., May 1970).

[69] The Juris Doctor: A Year in Review, 11 Student Law. 11 (June, 1966).

[70] R. Sims, Law Students Gather to Face Challenges, 12 Student Law. 18 (May. 1967); 8000 Students Want LSP, 15 Student Law. 19 (Sept. 1969).

[71] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 106 (1968).

[72] See, J. Stone, Legal Education and Public Responsibility (1959); Symposium on Education in the Professional Responsibilities of the Lawyer, 41 U. Colo. L. Rev. 303 (1969).

While other types of schools use clinical programs, most notably those in the health education area, the nature of the legal profession creates special problems for clinical training administered by a formal educational institution. The medical school model, for example, is not applicable. Nor does the clinical model of the laboratory or engineering science fit the professional opportunities for clinical education in law.

Some programs of a clinical nature have long been part of, and are unique to, legal education - e.g., moot court and practice court. Experiments in new approaches to this area are an integral part of the modern law school [73] and have been encouraged by the activities of the Council on Legal Education for Professional Responsibility. Most notable are the programs which provide the third year law student with conditional status at the bar and permit him to engage in supervised practice of the profession. This sort of program poses special operational and manpower problems for the law school, and gives great immediacy to the law teacher's ethical and other obligations as a professional practitioner.

And then, of course, the previously discussed problem of the upper classman's syndrome[74] provides the law teacher with another set of curriculum concerns which he shares with, but essentially only with, his fellow professors of law.

---

[73] See, generally, Clinical Education and the Law School of the Future, (E. Kitch, ed. 1970); AALS Statement to Senate Subcommittee on Education, reported in AALS, Proceedings of 1970 Annual Meeting, Part One at pp. 49, 62-65.

[74] Note 47, above, and accompanying text.

Still another unique curriculum concern of the law faculty is its role in aiding the practicing profession to keep abreast and to improve the quality of its performance. A few other professional school faculties share an analogous obligation to their professional colleagues but the nature of each profession is sufficiently different to necessitate distinctive approaches in meeting that responsibility. In the case of continuing legal education, bar associations and special entities such as the American Law Institute, the Practicing Law Institute, and the Southwestern Legal Foundation, have developed particular roles for providing the profession with academic resources. Law schools, too, have participated in a variety of individual, supplementary, and supportive programs. As a result, law faculties have a special need to coordinate with a variety of professional organizations in the process of maximizing the contribution of their own continuing legal education activities.

An additional force shaping law school curriculum decisions is the expectation that most law school graduates will take a bar examination which they must pass prior to being admitted to practice the profession. Although legal educators generally are adverse to permitting the pattern and content of legal education to be dictated by the bar examination, some fallout is inevitably felt in the law school curriculum - at the very least in terms of student elections amongst non-required courses. To minimize the impact of the bar exam upon curriculum design, law faculties must devote considerable time and effort to maintaining a liason with the bar examiners so as to keep them abreast of the developments in legal education. Similarly, legal educators have a need to gain better understanding of the impact of the bar exam on bar admissions and legal training. In this connection, the AALS is sponsoring a special study project on bar examinations.

10. Law Faculty's Special Concern Respecting Library Facilities. -

The law library is a central element of the law school. For this reason, the Approved AALS Policy notes that the law faculty should have an effective voice in its operation, that it should operate as an integral part of the law school, and that it should have sufficient autonomy in matters of administration, finance, personnel and service to accomplish its high standard of performance.[75]

Law faculty interests in the operations of the law library are of a greater magnitude than are the typical library concerns of university faculty. In addition to the law library being the focal point of his teaching and research activities, the law teacher has a responsibility to his fellow professionals to maintain the law school library as a major regional resource for the entire bar. Partly for this reason and partly due to the intrinsic nature of a law library, the demands for adequate law library facilities are far beyond those normally encountered at a university. This can to some extent be illustrated by comparing the ratio of books to students in university libraries with the number of law school library holdings per student. The university-wide data is provided in an H.E.W. publication.[76] The law library figures may be computed from information available in the Pre-Law Handbook.[77] Although the H.E.W. data counts part-time students on a fractional basis, in making our computations we have treated part-time and full-time law students alike with the result that smaller ratios for the law schools were achieved than would have been computed had the H.E.W. approach been used. Nevertheless, for the fifteen institutions in our sample for which complete data is available, the median number of volumes per student in the university libraries is 57, whereas the median number of volumes per student for the law library is 223. The full schedule of these comparisons is set forth in the footnote below.[78] The criteria for an "excellent" law library calls for 350 volumes per student.[79]

---

[75] Article 6 § 8, Articles of the AALS at AALS, Proceedings 1968 Annual Meeting, Part Two at p. 231.

[76] U.S. Dep't. of H.E.W., Library Statistics of College and Universities: Fall 1969 at Table 1 (1970).

[77] AALS-LSAT, 69/70 Pre-Law Handbook at Appendix B(1) (Bobbs-Merrill ed.).

Moreover, the nature of a law library is such that it is comparatively much more expensive to operate per patron and per volume than is the typical University library.[80] It is not at all surprising, therefore, that law

---

[78]

School	University Library Volumes per Student	Law Library Volumes per Student
Alabama	57	310
Boston	78	165
Case-Western Res.	113	290
Connecticut	52	157
Florida State	51	120
Kentucky	56	223
Marquette	51	214
Missouri	52	357
N. Carolina	101	256
St. John's	43	106
S. Carolina	70	123
Temple	34	242
Utah	67	303
Wash. & Lee	175	227
Wisconsin	55	212

[79] M. Gallagher, The Law Library in a New Law School, 1 Tex. Tech. L. Rev. 21, 27 n. 14 (1969).

[80] M. Gallagher, supra at p. 29. In 1967 only three out of 23 categories of library book purchases had an average price above that of law books, in 1969 only one out of 23 categories out priced law books, and in 1970 only 3 of the 23 categories were more expensive. The average price for law books in 1970 was 41% higher than the average for all book categories. 199 Publishers' Weekly, Feb. 8, 1971 at p. 51.

faculties find it important to play a very active role in shaping law library policy. Accordingly, a 1957 survey showed that in 3 out of 5 schools reporting, the selection of the law librarian was treated as a law school matter; in 4 out of 5 schools reporting, the law librarian's salary was treated as a law school matter; the presentation of the law library budget was a law school matter in two-thirds of the schools reporting; and law library hours were a law school matter at over two-thirds of the schools reporting.[81]

V.

ARGUMENT

1. Preliminarily. -

In traditional terms, this amicus brief supports a single plant or departmental type unit for law faculty. Congress was aware of the need for such a separate voting unit for a particular professional group when it adopted the Labor Management Relations Act of 1947,[82] and the cases and decisions clearly hold that it is appropriate to place different groups of professionals in separate voting units even though all work for a single employer.[83]

---

[81] AALS, Anatomy of Modern Legal Education at p. 432 (1961).

[82] In summarizing the Conference agreement, Senator Taft stated: "The House Bill did not contain any definition of the term 'professional employees,' although section 9(f)(3) thereof recognized the principle embodied in section 9(b) of the Senate amendment by permitting professional personnel to have voting units of their own in representational cases." (Emphasis supplied) NLRB, Legislative History of the Labor Management Relations Act of 1947, at p. 1537 (1948).

The Senate Report on the original bill, in discussing the amendments respecting professional employees, stated that section 9 would "require separate voting units of professional employees." (Emphasis supplied.) Id. at p. 425.

The principle of the Taft-Hartley amendments respecting professional employee units was stated in the House Conference Report as "to give groups of employees having common characteristics and interests different from those of the more numerous members of a proposed unit a greater freedom of choice in selecting their representatives. . . ."[84] And the Senate Report on the original version of Senator Taft's bill specified that the new provisions respecting professional employees were in recognition of the professional employees' interests in maintaining certain professional standards.[85]

It is the position of this amicus brief that law school professors constitute a group which shares common characteristics and have interests quite different from those of other university professors,by far the more numerous members of the proposed unit. The special interests of the law faculty, moreover, include the maintenance of the standards of the legal profession.

---

[83] Westinghouse Electric Corp. v. N.L.R.B., 236 F.2d 939, 943, (3d Cir. 1956); Douglas Aircraft Co., 157 NLRB 791 (1966); Westinghouse Air Brake Co., 121 NLRB 636 (1958); Western Electric Co., 98 NLRB 1018 (1952). See also, Royal Globe Ins. Co., 29-RC-1081, 1969 CCH NLRB. Dec. ¶20,695 (Mar. 19, 1969) where Regional Director Kaynard placed different groups of lawyers in separate voting units.

[84] NLRB, Legislative History of the Labor Management Relations Act of 1947, at p. 551 (1948).

[85] Id. at p. 417.

Therefore, the intent of the Act, as described above, will be carried out only if the Board rules that professors of law constitute a preferred unit in elections involving university faculty.

2. Applicable Criteria. -

An essential task in resolving the instant issue is to ascertain the correct criteria for separating out a particular group from a larger group of professionals. The broad guidelines for making that distinction are provided by the legislative history of the "professional option" provisions of section 9, discussed above: Does the particular professional group have common characteristics; does the particular professional group have interests different from the professionals in the more numerous unit which has been proposed; and would a separate unit for the particular professional group serve to maintain the distinctive standards of that profession?

Additional, and more detailed, guidance is provided by the Board's prior decisions in professional, plant and departmental unit cases. An examination of those decisions reveals that the Board has recognized a separate professional, plant or departmental unit as the preferred voting unit where the following factors manifested a distinctive community of interest:

(a) Lack of Functional Integration The Board tends to establish separate units where there is little or no integration in the functional responsibilities of the several groups of employees.[86] Functional integration of an operation provides a basis for projecting the extent to which there will be job related interpersonal contact and a sense of mutual identity between the members of the various proposed units. Perhaps even more importantly, the extent of functional integration indicates the potential viability of a voting unit for bargaining purposes - that is, whether a particular unit can muster meaningful bargaining leverage - and the degree to which the bargaining behavior of a separate unit will disrupt the work activities of members of a larger or other separate unit.

---

[86] E.I. Dupont De Nemours, 162 NLRB 413, 419-420 (1966).

(b) Separate Sense of Identity. A realistic opportunity to collectively organize and establish meaningful collective bargaining goals is fostered by a sense of mutual identity amongst the unit members. For this reason, a separate bargaining unit is preferred where a group has a separate and distinctive sense of identity. The Board seeks to ascertain the mutuality or separateness of employee identity in making its voting unit determinations by examining a number of factors. Included is the nature of the differences or similarities in job skills and functions.[87] The lack of permanent interchange or temporary job transfers are additional factors frequently used by the Board in weighing the quality of mutual identity.[88] Differences in benefits policies amongst professional, departmental or plant groups suggest that there will be an accompanying lack of mutual identity.[89] Dissimilarities in employee background and training will also reduce the likelihood of a mutual sense of identity.[90] The same is true with respect to differences in employee licensing requirements.[91] Differences in job progression criteria and patterns provide yet another indicator that there may be an absence of a sense of mutuality of identity.[92] And, still another indicator used by the Board is the extent to which work schedules vary between the two groups of employees in question.[93]

---

[87] Cornell University, 183 NLRB No. 4 (1970); Ladish Co., 173 NLRB No. 5 (1969); Arnold Constable Corp., 150 NLRB 788 (1965); Standard Oil Co., 107 NLRB 1524 (1954).

[88] Empire State Sugar Co., 166 NLRB 31 (1967) aff'd, 401 F.2d 559 (2d Cir. 1968); Douglas Aircraft Co., 157 NLRB 791 (1966); Georgia-Pacific Corporation, 156 NLRB 946 (1966).

[89] Parke Davis & Co., 173 NLRB No. 53 (1968); Empire State Sugar Co., supra.

(c) Physical Proximity of Work Situs. Physical separation of the work situs, too, contributes to the Board's evaluation that a separate professional, departmental, or plant type unit is preferable.[94] Physical separation is a relevant criterion for much the same reason as is lack of a sense of mutuality of identity. In addition, lack of physical proximity poses serious problems to the organizational opportunities for different groups of employees. The specification of the "plant unit" as one of the enumerated unit categories in section 9(b) of the Act demonstrates that Congress viewed the characteristic of the physical separateness of the work situs as particularly significant.

(d) Degree of Unit Autonomy. Decision making autonomy increases the likelihood that a unit will have distinctive terms and conditions to collectively negotiate and independent bargaining interests to be served by a bargaining agent. Further, the degree of autonomy will influence the extent to which one group of employees must depend on another group for bargaining effectiveness. It will also influence the prospect that the bargaining conduct of one group will or will not have direct consequences for the other; that is, for an autonomous employee group, a separate unit provides the most meaningful opportunity to negotiate effectively on a collective basis. Therefore, the presence of autonomy strongly indicates that a separate unit will be preferred.[95]

---

[90] Ladish Co., supra note 87; Standard Oil Co., ibid.

[91] Parke Davis & Co., supra note 89.

[92] Georgia-Pacific Corp., supra note 88; Parke Davis & Co., supra note 89; Douglas Aircraft, supra note 88.

[93] Parke-Davis & Co., supra note 89.

[94] Parke-Davis & Co., supra note 89; Douglas Aircraft Co., supra note 88.

A number of factors which the Board traditionally examines, in determining whether a separate professional, departmental or plant unit will be preferred, provide insight into the extent to which the unit is autonomous. These factors include whether there is independent control over recruitment and hiring in the unit;[96] whether the group is separately supervised;[97] and whether the group has a different work schedule.[98] Bargaining history provides still another item in the Board's evaluation.[99] And, factors such as job progression patterns and comparitive compensation benefits are relevant to evaluating the extent of autonomy as well as in weighing the mutuality of identity.

3. Application of the Criteria. -

It should be apparent from the portrayal contained in Part IV of this brief that those who teach in an accredited school of law are members of a distinctive professional group - professors of law. Certainly there can be no question but that the law school faculty satisfies the criteria of constituting a group "having common characteristics". From the detailed description provided in Part IV, it is equally clear that the law faculty meets the complete array of tests used by the Board to establish that it is a group with significant interests which are different from those of the more numerous group, the university faculty.

---

[95] Metropolitan Life Ins. Co., 156 NLRB 1408 (1966).

[96] Ladish Co., supra note 87; Douglas Aircraft Co., supra note 88.

[97] Georgia-Pacific Corp., supra note 88; Parke Davis & Co., supra note 89.

[98] Parke Davis & Co., supra note 89.

[99] Georgia-Pacific Corp., supra note 88.

(a) Lack of Functional Integration. University faculties can and do function without a faculty of law; law faculties can and do function without a university faculty.[100] Perhaps the acid test in this regard ought to be what the impact of a work stoppage in either unit would have upon the other unit's operations. In the event of a work stoppage in the law school, the remainder of the university could continue to function on a business as usual basis. The same would be true for the law faculty's ability to function in the event of a work stoppage amongst the rest of the university faculty. In fact, due to academic calendar differences, this state of affairs presently exists for short periods of time on an annual basis at a majority of the nation's accredited law schools.[101]

Further,past experience shows that the law faculty is a viable bargaining unit while operating on its own. Though the university can function with the law school closed, a most valuable and visible dimension of the university's social contributions are dependent on the law school's activities. Accordingly, operating from the strength of its own position, the law faculty has traditionally been able to command superior faculty, library and physical resources.[102]

---

[100] See Part IV §§ 1,3,9,10 of this brief.

[101] See Part IV § 3 of this brief.

The Board has previously placed functionally different professionals, such as nurses,[103] distinctive types of engineers[104] and lawyers,[105] outside of a larger unit of professional employees. Consistent with that precedent, the Board should now find that law faculty members, because of their functional distinctiveness, should be placed in a separate voting unit.

(b) *Separate Sense of Identity*. As previously noted, law teachers identify strongly with each other and are somewhat removed in their relationships with members of other faculties.[106] This sense of separate identity is reinforced by the law faculty's characteristically different type of academic background[107] and work experience,[108] its close link with the practicing profession,[109] and the law faculty's separate promotional criteria,[110] and promotional[111] and salary schedules.[112] Further, the separate and unique teaching experience shared by a law faculty adds to this sense of separate identity,[113] as does the distinctiveness of the particular group of students with whom law teachers are in daily contact.[114] Moreover, operating out of separate facilities,[115] utilizing an independent and unique library,[116] and coping with the particular problems of the law school curriculum,[117] all contribute to the law teacher's separate sense of identity. To convert this to the standard industrial relations terminology, we might say that the law teacher has special training for a special trade, exercises a unique set of skills, and applies these skills in a different sort of environment to a different type of raw material, producing a special and unique product. It is no wonder that the law faculty has a separate and independent sense of identity.

---

[102] See Part IV §§ 2,5,10 of this brief.

[103] *Westinghouse Air Brake Co.*, 121 NLRB 636 (1958); *Westinghouse Electric Corp.*, 112 NLRB 590, 591 (1955); *Standard Oil Company*, 107 NLRB 1524 (1954).

[104] *Douglas Aircraft Co.*, 157 NLRB 791 (1966); *Westinghouse Air Brake Co.*, supra note 103. Compare, *The Ryan Aeronautical Co.*, 132 NLRB 1160 (1961).

[105] *Westinghouse Air Brake Co.*, supra note 103; *Lumbermen's Mutual Casualty Co.*, 75 NLRB 1132 (1948). In *Air Line Pilots Ass'n.*, 97 NLRB 929 (1951), the Board established a voting unit consisting of 3 lawyers, 2 engineers and a statistician. No one petitioned for a separate unit of the lawyers or a separate unit of the engineers, and the Board did not discuss the question of whether lawyers and engineers belong in the same unit.

[106] See footnote 35, and accompanying text.

---

[107] See footnotes 17-23, and accompanying text.

[108] See footnotes 15-16 and 28, 28a, and accompanying text.

[109] See pp. 26-27 of this brief. It might be noted, in this connection, that unlike the part-time teachers in C.W. Post Center of Long Island Univ., 198 NLRB No. 109 (1971), the part-time law teacher's chief full-time function is not teaching. Rather it is law practice. (See footnotes 37-40, and accompanying text.) Through their relationship with the law faculty, therefore, part-time law teachers help to draw legal education into even closer communion with the practicing profession.

[110] See footnotes 24 and 25, and accompanying text.

[111] See footnotes 25-28, 36, and accompanying text.

[112] See footnotes 29-34, and accompanying text.

[113] See Part IV §7 of this brief.

[114] See Part IV §6 of this brief.

[115] See Part IV §2 of this brief.

[116] See Part IV § 10 of this brief.

[117] See Part IV §9 of this brief.

In its separate sense of identity, the law faculty is at least as distinctive and apart from the rest of the university faculty as were the sales and service engineers separate and apart from the production engineers in *Westinghouse Air Brake Company*, 121 NLRB 636 (1958), where that group was placed in a separate voting unit by the Board. The law faculty's separate sense of identity is surely much greater than that of the members of the different departmental units allowed in the *Arnold Constable* case;[118] and it is at least equivalent, in its intensity of distinctiveness, to that of the nurses, lawyers and engineers given separate voting units in a variety of decisions.[119]

The law faculty by their training, function and responsibilities have a separate professional sense of identity emanating from their joint professional status - - they are members of both the teaching profession and the legal profession. Thus, the law professor's attempt to preserve that special professional identity presents the very kind of need to which Congress was responding when it adopted the Taft-Hartley provisions concerning professional employees.[120] To reject the contention of this brief would accomplish the result condemned in *Westinghouse Electric Corp. v. NLRB*, 236 F.2d 939, 943 (3d Cir. 1956), where the court reasoned that acceptance of the position that all professionals should be in one unit "would result in the negation of many recognized professional groups characterized by their speciality . . . ." Therefore, the Board should recognize the separate unit of law faculty as preferred.

(c) *Physical Distinctiveness and Separation of the Work Situs*. Law teachers work in a different library, typically teach in different classrooms, and are housed in an office complex which is separate from that occupied by the rest of the university's teachers. Almost always these facilities are in a separate building, often in a corner of the campus, and fairly frequently they are removed a considerable distance from the central campus.[121]

---

[118] 150 NLRB 788 (1965).

[119] See footnotes 103-105, supra.

[120] See footnotes 84 and 85, and accompanying text.

In the jargon of academe, the term 'separate physical plant' is often used in describing a building which houses a separate academic unit. Inasmuch as the law school is almost always a 'separate physical plant,' the plant unit analogy is particularly appropriate in analyzing the merits of giving preference to the law faculty as a separate voting unit.

(d) Degree of Unit Autonomy. Law faculties traditionally have a very high degree of autonomy.[122] Partly this is due to the functional distinctiveness of the law school, partly it is attributable to historical development, and partly it is a result of the numerous unique attributes of legal education and law teachers.

That law faculties typically have a great deal of operational and planning autonomy can be appreciated by considering that they normally operate out of separate plants,[123] manage their own library,[124] work under separate academic calendars,[125] use their own faculty recruitment and promotional standards,[126] operate on a special compensation schedule,[127] determine the standards for student admission[128] and for the awarding of degrees,[129] utilize a distinctive pedagogical methodology,[131] structure their own curriculum and courses,[132] deal directly with a special public, to which it may at times pay greater heed than to the university itself,[133] and select their own chief administrative officer.[134]

---

[121] See Part IV §2 of this brief.

[122] See Part IV §4 of this brief.

[123] See Part IV §2 of this brief.

[124] See Part IV §10 of this brief.

[125] See Part IV §3 of this brief.

[126] See Footnotes 15-28, and accompanying text.

The law faculty's high degree of autonomy reflects the fact that its interests are different from those of the larger faculty group -- the university-wide faculty. Further, its autonomy demonstrates that the law faculty has a very practical basis for its sense of separate identity and that it is fully capable of operating as a separate, independent and viable bargaining unit without causing any extraordinary disruption or hardship to the functioning of the university.

The manifest autonomy of the typical law faculty far exceeds that found to warrant a separate voting unit in past decisions.[135] Accordingly, the extensive autonomy of the law faculty impels a decision that a separate unit of law faculty should be preferred.

4. Dangers Inherent in Immersing the Law Faculty Within a Larger Faculty Unit.

The foregoing discussion should make it evident that all of the usual considerations in voting unit determination cases compel the result that a separate unit be preferred by the Board for the law faculty. But were the usual considerations the only ones involved in the present issue, the AALS might not have deemed it necessary to make this amicus appearance. Rather, there are at least two additional concerns respecting the instant issue which elevate the question to one of great urgency for an association dedicated to the purpose of improving the legal profession through legal education.

---

[127] See footnotes 29-34, and accompanying text.

[128] See, e.g., Approved Association Policy §6-1 in AALS, Proceedings, 1965 Ann. Meeting, Part One, at pp. 159-160.

[129] See, e.g., Approved Association Policy §6-2, supra n. 128 at p. 160.

[131] See Part IV §7 of this brief.

[132] See footnote 10 and Part IV §9 of this brief and accompanying text.

[133] See footnote 14, and accompanying text and the final two paragraphs of Part IV §9 of this brief.

[134] See footnote 12, and accompanying text.

[135] Douglas Aircraft Company, 157 NLRB 791 (1966); Arnold Constable Co., 150 NLRB 788 (1965). See also, Lumbermen's Mutual Casualty Co., 75 NLRB 1132 (1948).

Professor Donald Wollett is probably the nation's most experienced academic observer of unionizational activities in higher education. In a recent article he pointed out that to attract and retain quality faculty in a professional area such as law, "universities often find it necessary to prescribe lighter work loads and larger salaries than those of other faculty groups . . . ."[136] Reflecting on the impact of a university-wide unit determination, he goes on to state:

> Collective bargaining agents tend to favor policies that treat all employees alike. . . . If collective negotiations result in a reduction in the favorable differentials enjoyed by professional school faculties, the ability of those schools to attract and retain quality faculty and to function at present performance levels will probably be diminished.[137]

The AALS concurs in Professor Wollett's prediction that negotiation on a university-wide unit basis will adversely affect the quality of legal education. There is no good reason for risking that result inasmuch as the intent of Congress in promulgating §9(b) of the Act is more accurately served by preferring a separate unit for law faculty.

Secondly, legal education (as, perhaps, all of higher education) is in a phase of considerable reappraisal and transition. The law faculties, the bench, and the bar are all actively engaged in this reevaluation.[138] Encompassed in the current review of legal education are such questions as the optimum duration of formal professional education in law; course and curriculum content; teaching methodology; expansion, protraction or revision of clinical programs; the direction, tools and content of scholarly efforts in law; financial resources for legal education; budgetary priorities; and the relationship of law teaching and legal scholarship to other academic disciplines.[139] Presently the locus of decisionmaking on matters of educational and personnel policy in legal education is decentralized and independent of effective control by university administration. There are those (usually persons in university administration) who argue that the law schools should surrender a significant part of that autonomy and become more comprehensively integrated into the university system.[140] Law faculties, on the other hand, as the academic representatives of the legal profession, see many reasons to be cautious against submergence of their special and distinctive role into a larger and more homogeneous group.

---

[136] D. Wollett, The Status and Trends of Collective Negotiations for Faculty in Higher Education, 1971 Wisc. L. Rev. 2, 18.

[137] Id. at pp. 18-19.

A decision by the National Labor Relations Board to immerse the law faculty into the larger faculty unit could well have the effect of a fait accompli respecting the role of the law school in a modern university. As we have seen, that decision could be quite detrimental to the quality of legal education. In any event, surely, if change in that relationship is to come, it should result from a decision made by those entrusted with the responsibility for guiding legal education.

---

[138] Statement of the AALS to Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Ann. Meeting, Part One at pp. 49, 50.

[139] Id. at pp. 50-52, 55-72.

[140] See, e.g., various commentaries in Haber & Cohen, The Law School of Tomorrow at pp. 5-80 (1968).

A decision to immerse the law school within the larger university-wide faculty unit might well foreclose any further reappraisal of, or adjustment in, the law school's role within the university and its relation to the profession. Rather, such a determination would tend to move that relationship in the specific direction of total submergence within the University faculty. On the other hand, recognizing that the law faculty is a preferred voting unit apart from the larger university faculty would permit continued reappraisal and adjustment in the law school-university relationship.

VI.

CONCLUSION

From the foregoing, it is clear that the Board will most accurately effectuate the intent of Congress most closely adhere to its prior decisions, and most effectively respond to the needs and interests of higher education and academic training in the legal profession, by determining that a separate unit of law faculty is the preferred voting unit under the Act.

Respectfully submitted,

Of Counsel:

Brenda Hamer
Lexington, Kentucky

Walter Oberer
Cornell Law School
Ithaca, New York 14850

Robert A. Gorman
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Alvin L. Goldman
University of Kentucky College of Law
Lexington, Kentucky 40506

Counsel for the Association of American Law Schools

By: ____________________
ALVIN L. GOLDMAN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May , 1971, he caused a copy of the Amicus Brief to be served by certified mail upon each of the following:

Ian Gilbert, Esq.
Royall, Koegel & Wells
200 Park Avenue
New York, N.Y. 10017

Stuart Rothman, Esq.
Royall, Koegel & Wells
1730 K Street, N.W.
Washington, D. C. 20006

Joseph R. Crowley, Esq.
140 West 62nd Street
New York, N.Y. 10023

American Association of University Professors
Attn: Matthew Finkin, Esq.
11 West 42nd Street
New York, N.Y. 10036

Ivan C. McLeod, Regional Director
N.L.R.B.
26 Federal Plaza (36th Floor)
New York, New York 10007

Irving Panken
260 Park Avenue South
New York, N.Y. 10010

Dated: Lexington, Kentucky
May , 1971

ALVIN L. GOLDMAN

JOURNAL OF LEGAL EDUCATION

Volume 17 Number 3

LAW SCHOOLS AND THE UNIVERSITIES †

EDWARD H. LEVI *

I suppose it is true that in an important sense law schools today are stronger than they ever have been. Students are becoming plentiful. A sufficient number of them are attractive, well balanced, and marketable. Three years of ordinary growth and loss of sleep will make them look the way law offices think entering law clerks should look. In some instances their geographical distribution is likely to be such as to give them good points in some employer's eyes. He likes home grown products if they are the right kind. He also likes to pull in the best from faraway places. On top of that, the lad by then may have been a law clerk to a Supreme Court Justice. Many of the law students have high aptitude scores—a sufficient number to enable the quality law schools to vie with each other on their average and minimum scores, in a continuous effort to convince themselves that their students are really good. The drive, imagination, and tolerance of the students are wonderful. They enable the students to relish the stimulating atmosphere of a closed society, which at times partakes of the sadistic flavor of an intellectual boot camp, and at other times is a grand theatrical performance in which every law professor is a Supreme Court Justice—U. S., that is. When the students come, they don't read or write very well. This enables law school deans to make courageous speeches on this controversial topic. It also gives the law schools something to do, for the training which is offered is largely a training in reading and writing. Despite this training, complaints concerning the failure of entering students to read or write well evoke a sympathetic response from law firms, for they know that law graduates are similarly incapacitated. Of course, as night follows day, a certain number of law students will make the Law Review. From this group, future law professors will be picked. They become full professors very fast, because they are very bright, have good aptitude scores, make good grades, and, at the very least, were on the Law Review.

---

† Address delivered at the annual meeting of the Association of American Law Schools in Chicago, Illinois, on December 29, 1964.

* Provost, The University of Chicago.

I assume this partial and unbalanced description will be taken for the loving caricature which it is intended to be. It is not easy to describe the modern university law school—partly prep school, partly graduate school—in part directed toward the intellectual virtues and the attributes of scholarship, and yet in main thrust the producer of technicians for a learned (and sometimes demi-learned) profession containing within itself many of the same contradictions and conflicts. I recall a talk, probably given for proselytizing purposes, by a most eminent law teacher in which he referred in a matter-of-fact way to the "pecking order," as he described it, among the law schools of the Ivy League. Since I was dean of one of the greatest law schools in the world in one of the greatest universities in the world, and that university did not even play intercollegiate football, I was at a momentary loss to understand what the Ivy League business had to do with the law or law schools. I was further puzzled because I had forgotten that his particular urban university was even in the Ivy League. But then with the ability to reason given to me through legal training, I realized this was the whole point. The finishing school or prep school attributes are still with us. But the result is not bad. The *esprit* and spirit of the modern law school are the wonder of many graduate departments and other professional schools. Indeed, recognizing the slowness with which education proceeds in the United States, we have created a liberal arts graduate program and have given to it a generalist professional thrust to justify an across-the-board attention to precision and structure within a common subject-matter. We have substituted the law for the classics. We are for the most part overwhelmingly interested in teaching, which to some extent sets us apart from other graduate areas. We are giving the modern counterpart of a classical education to many who will be the leaders of our country as well as of the Bar. The result is a powerful intellectual community in which a continuous dialogue is not only possible because of the sameness of subject, but is insisted upon both because of the method of instruction and the type of research which is expected and honored. The subject-matter may be that of the social sciences, but we are the inheritors of the humanistic tradition. We create structures and admire them. We initiate our students into appreciation and make artists of the best of them. We write book or court opinion reviews with enthusiasm or acrid distemper, which the layman misunderstands as somehow being concerned with the practical effects for good or bad of particular decisions. Poor layman. He does not understand that we are artists, not social planners.

If this description has any considerable element of truth in it, I think we must agree that the modern university law school (and I realize of course that not all modern law schools are in universities) could not so well exist outside of a university environment. At the very least the university has placed a protective cloak around the school. I think the result which has been achieved is perhaps largely unintended, or at least has not been directly faced.

The motor power, of course, is still the thrust for the training in a profession. The Bar still regards the modern law school as the successor, not only in time but also in spirit, to the law office traineeship. The law faculties still worry most directly about the actual problems which graduates may face. The focus of law school discussions may be good, hard, tough actual problems, or problems thought to be so, no matter how far from reality they really are. But in truth this is a liberal arts education in structured reasoning. So far as subject matter is concerned, it could be cut down to two years, or, if this were really desired, it could be expanded to cover much more of the art of practice. Perhaps taking seriously the mission of the law school to train the elite citizen to participate in government within a democracy, including the governmental function of private practice, the education should—indeed must—expand to draw into itself the new knowledge of the social sciences. But change is difficult and our skepticism, which is our stock in trade anyway, is very great. We are the victims of our own success. We have a protected oasis within the university community, and we are doing just fine. Moreover, I should say at once that the law school contribution to a university through the school's adherence to the liberal arts tradition at the graduate level—a tradition of talk and skepticism and appreciation, and its strong tradition of interest in instruction and concern for students—is very great. One can have a great university without a law school, because it has been done, but it must be much more difficult.

The modern university, mirroring many of the conditions of modern life, has changed a great deal in the last quarter-century. In the first place, it is apt to be very large not only in numbers of students and of faculty, but in the sheer number of transactions, financial or otherwise, which take place. Second, there has been an enormous change in the research environment of many universities, and to some extent what is meant by research. The large machines needed for important scientific research are expensive. A considerable portion of the budget of a university, between one-third and one-fourth in some instances, may reflect governmental support for research largely in the biological and physical sciences, and to some extent in the more behavioral aspects of the social sciences. Individual faculty become entrepreneurs for financial support, and in one way or another become accountable for the time which they spend upon it. The weight of the jobs to be done and the evolving structure of the modern university encourage the pulling away of faculty groups into more or less separate entities. And this comes at a time when a whole view of the university is desperately needed.

The values represented in a university are still taken for granted. Among these are the pursuit of knowledge for the purpose of understanding; the acceptance of the power of the free spirit of inquiry. But the modern condition appraises the productivity of the institution in terms of the numbers of students handled and the research which counts. This is not a conflict between the scientific and the humanistic spirit, as has been said, but whether either will survive in strength the condition which has made possible the much-needed support of education and research in our day. That condition is the acceptance of the importance of education and research because of the material gains they make possible and because of their impact upon security. The inner spirit and the cultural values which provide the setting and the reason are not forgotten, but neither are they much loved for their own sake. Perhaps they never are, and yet they are all-important.

In this setting, the modern law school within a university community finds its position considerably altered. The law school as a graduate area is no longer particularly unique by virtue of its post-undergraduate status. There are many graduate areas, and graduate work is the assumed objective of a large proportion of undergraduate students. A recent study showed twenty-six per cent of the students in some large state schools and up to sixty-five per cent and seventy-two per cent in other selected colleges intending to go on to do graduate or professional study. Recent studies have been interpreted also (and I don't believe them) to suggest that Ph.D. and medical students are even brighter than law students. But what this says, and we all know it, is that some of the uniqueness of the law school by virtue of its post-graduate study, and the uniqueness of the bar itself, are diminishing. Lawyers after all were first important—and this was a long time ago—because they could read and write, not in the way law school deans now say they should, but barely. Now many people can read and write in the same way. Then they were unique because they were the undoubted leaders in the community. They are still among the leaders, but there are many professions which in some sense have taken over. Business itself has become a profession, and is gaining strong professional and well-supported schools. The lawyer now finds himself advising clients in industry who have had more schooling than he has had and who have been back for more high-level refresher courses than are available in the law school world. Law schools are not unique either, to the extent that through their Association or otherwise they demand special recognition of their separatism, as, for example, on such an important matter that the law library be autonomous, whatever that means.

Every area of the university is apt to demand the same kind of recognition in the flurry of centrifugal forces which have overtaken the modern institution of learning. What may be unique is that the law schools have relatively less financial means to go it alone than some of the other areas. Law schools do not get large federal financial grants, and the day when law schools could operate as large tuition-receiving institutions is probably vanishing. Even the competition of the Bar may not be the help to law school faculty salaries in that unique sense which may have been assumed. There is a lot of competition for physicists, mathematicians, economists, and, perhaps because of the speeches of law school deans, even English professors. I fear I am now distorting what should be the merit of the inner spirit and cultural values with somewhat crass material considerations. But if universities are to be divided up for the benefit of those areas which bring the most money or have the greatest political power, I doubt the law schools will fare very well.

These thoughts are not a newfound cloak to protect a professor of law on leave as a central administrator. I got them, mistakenly or otherwise, as a law school dean. Indeed, I was summoned along with some of my colleagues to appear before the Legal Education Section of the American Bar Association, which has some intimate connections with your organization, to show cause, as it were, why our school should not be punished because our law library, while in fact quite separate, was part of the university system, and therefore not autonomous, and because of our recalcitrance in observing a university rule that we could not publish the separate law school faculty salary schedules. The faculty of which I was a member took the position it did because I think we realized that in the long run the strength of law schools would be greater to the extent they were part of the universities, and that separatist pressures upon universities weaken these institutions. I realize of course the public spirit and, to some extent, the provocations which have induced such separatist moves. But I suspect that at least now, or if not now, soon, the greater glory and the greater service is all the other way, and lawyers who so frequently are the guardians of the resources of our universities as well as of our law schools should be the first to recognize this.

Just as lawyers conceive of themselves as generalists and frequently are, so law professors move naturally to this same role within the university community. They come armed with a discipline and a structure of ideas covering a vast area of human knowledge and related to immediate issues of social policy. It is of course true that law, perhaps in an effort to establish itself as scientific, has often tended to make policy issues a matter of value judgments to be decided by political processes and upon which much cannot be said in any disciplined way. But the value judgments then enter into the argument anyway, even though perhaps illicitly, and the important thing is that the dialogue includes them. One might feel a little more comfortable about the role of the law schools in directing inquiry to social problems before they erupt into crises if, for example, on such matters as reapportionment we had been more concerned with the problem of urban and rural representation prior to the recent decisions, and were not so frequently satisfied to be only critics of the Court. Our law schools are court-tied to a considerable extent. Too much so, undoubtedly. And we are talking court law, when our colleagues within the university community are mistakenly grateful to us for discussing the underlying issues. They do not realize we are only talking law in a most narrow sense, and of course we aren't. This suggests that somewhere within the University structure, and probably not the mission of only one school in particular, a continuing and structured dialogue ought to be fostered on important policy issues. Much of this role sometimes indirectly and frequently directly, is performed by the law schools, and it is a magnificent and unique contribution. Law schools also have the opportunity—and sometimes they take it—to examine for law the consequences of apparent new knowledge and new techniques. One example is the research today which purports to show the overwhelming and perhaps defeating influence of early childhood environment upon later adolescence and the adult years. How should our legal institutions, fashioned for the protection of the family and also to protect the community, respond to these facts, if they are facts in a society which has mass delinquency and cultural deprivation? It is not, I think, sufficient for us to discuss only procedure, and to leave the substance to some unknown other discipline to pick up. A dialogue of values, in addition to our humanistic appreciation of our artistic creations of logic, is in fact within our tradition. It is one of the things which make us uniquely valuable to the university community.

As institutions, the law schools and universities confront each other with their own way of doing things. I suspect each could learn with profit from the other. The law schools offer an example of a community within a faculty, and including the students—a community unfortunately increasingly rare in the large amorphous university where remoteness and separatism has become the atmosphere felt by all. The university, on the other hand, increasingly backs the individual faculty member to help him go where his research runs, from one discipline to another if necessary, and without as many confining notions of what is *a priori* significant or achievable. The very sense of community which law schools have—and I hesitate to say this but I think it is true—have to some extent dampened the interest in new experiments and new directions by individual faculty on their own, backed up by the kind of research support which in one way or another is made available in other areas. And this indeed is strange with a subject as complicated and varied as law is, where the interdisciplinary work for one corner may be quite irrelevant in its lesson for work in another. I don't suppose it is significant in this respect that this association of law school professors is called an association of law schools. I should like to think that is a trick to compel the law schools to pay what otherwise would be our dues; yet the symbolism has some importance. Perhaps we should give less attention to what law schools do and give greater encouragement to law professors to do as they please. I realize, of course, that this is often done, but still the results from a little bit more might be surprising.

When I was a law school dean I had to say (or so I thought) that law and law schools were of the greatest importance to the larger community and to the universities of which they are a part. Now that I am in a sense free, I find that what I said was true. I had not fully realized, however, how intertwined the roles of law school and university were, nor had I appreciated that so much of the humanistic tradition is kept alive in the professional course of liberal arts—which is the law. And that is the sense of values which, while so frequently formally eschewed, helps give the law schools their distinction. It is good to hope that the values and ways of life of law schools and universities will gain from each other.

Report of the Joint Conference on Professional Responsibility

PROFESSIONAL RESPONSIBILITY: A STATEMENT

I.

A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame. All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation. Only such a dedication will enable him to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of immediate interest.

The legal profession has its traditional standards of conduct, its codified canons of ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the canons is not equivalent to the practice of professional responsibility.

A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Under the conditions of modern practice it is peculiarily necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. Today the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined. In these areas the lawyer who determines what his own contribution shall be is at the same time helping to shape the future role of the profession itself. In the duties that the lawyer must now undertake, the inherited traditions of the bar often yield but an indirect guidance. Principles of conduct applicable to appearance in open court do not, for example, resolve the issues confronting the lawyer who must assume the delicate task of mediating among opposing interests. Where the lawyer's work is of sufficient public concern to become newsworthy, his audience is today often vastly expanded, while at the same time the issues in controversy are less readily understood than formerly. While performance under public scrutiny may at times reinforce the sense of professional obligation, it may also create grave temptations to unprofessional conduct.

For all these reasons the lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between those obligations and the role his profession plays in society.

II.

In modern society the legal profession may be said to perform three major services. The most obvious of these relates to the lawyer's role as advocate and counselor. The second has to do with the lawyer as one who designs a framework that will give form and direction to collaborative effort. His third service runs not to particular clients, but to the public as a whole.

1.

The Lawyer's Service in the Administration and Development of the Law.

The Lawyer's Role as Advocate in Open Court.

The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest. It is essential that both the lawyer and the public understand clearly the nature of the role thus discharged. Such an understanding is required not only to appreciate the need for an adversary presentation of issues, but also in order to perceive truly the limits partisan advocacy must impose on itself if it is to remain wholesome and useful.

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.

Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

It is small wonder, then, that failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication. What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

These are the contributions made by partisan advocacy during the public hearing of the cause. When we take into account the preparations that must precede the hearing, the essential quality of the advocate's contribution becomes even more apparent. Preceding the hearing inquiries must be instituted to determine what facts can be proved or seem sufficiently established to warrant a formal test of their truth during the hearing. There must also be a preliminary analysis of the issues, so that the hearing may have form and direction. These preparatory measures are indispensable whether or not the parties involved in the controversy are represented by advocates.

Where that representation is present there is an obvious advantage in the fact that the area of dispute may be greatly reduced by an exchange of written pleadings or by stipulations of counsel. Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues becomes impossible. But here again the true significance of partisan advocacy lies deeper, touching once more the integrity of the adjudicative process itself. It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate. It is a part of his role to absorb these possible disappointments. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

The matter assumes a very different aspect when the deciding tribunal is compelled to take into its own hands the preparations that must precede the public hearing. In such a case the tribunal cannot truly be said to come to the hearing uncommitted, for it has itself appointed the channels along which the public inquiry is to run. If an unexpected turn in the testimony reveals a miscalculation in the design of these channels, there is no advocate to absorb the blame. The deciding tribunal is under a strong temptation to keep the hearing moving within the boundaries originally set for it. The result may be that the hearing loses its character as an open trial of the facts and issues, and becomes instead a ritual designed to provide public confirmation for what the tribunal considers it has already established in private. When this occurs adjudication acquires the taint affecting all institutions that become subject to manipulation, presenting one aspect to the public, another to knowing participants.

These, then, are the reasons for believing that partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society. But if we were to put all of these detailed considerations to one side, we should still be confronted by the fact that, in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.

Viewed in this light, the role of the lawyer as a partisan advocate appears, not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.

When advocacy is thus viewed, it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

The Lawyer's Role as Counselor.

Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lipserving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.

Although the lawyer serves the administration of justice indispensably both as advocate and as office counselor, the demands imposed on him by these two roles must be sharply distinguished. The man who has been called into court to answer for his own actions is entitled to a fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do.

2.

The Lawyer as One Who Designs the Framework of Collaborative Effort.

In our society the great bulk of human relations are set, not by governmental decree, but by the voluntary action of the affected parties. Men come together to collaborate and to arrange their relations in many ways: by forming corporations, partnerships, labor unions, clubs and churches; by concluding contracts and leases; by entering a hundred other large and small transactions by which their rights and duties toward one another are defined.

Successful voluntary collaboration usually requires for its guidance something equivalent to a formal charter, defining the terms of the collaboration, anticipating and forfending against possible disputes, and generally providing a framework for the parties' future dealings. In our society the natural architect of this framework is the lawyer.

This is obvious where the transactions or relationship proposed must be fitted into existing law, either to insure legal enforcement or in order not to trespass against legal prohibitions. But the lawyer is also apt to be called upon to draft the by-laws of a social club or the terms of an agreement known to be unenforceable because cancelable by either party at any time. In these cases the lawyer functions, not as an expert in the rules of an existing government, but as one who brings into existence a government for the regulation of the parties' own relations. The skill thus exercised is essentially the same as that involved in drafting constitutions and international treaties. The fruits of this skill enter in large measure into the drafting of ordinary legal documents, though this fact is obscured by the mistaken notion that the lawyer's only concern in such cases is with possible future litigation, it being forgotten that an important part of his task is to design a framework of collaboration that will function in such a way that litigation will not arise.

As the examples just given have suggested, in devising charters of collaborative effort the lawyer often acts where all of the affected parties are present as participants. But the lawyer also performs a similar function in situations where this is not so, as, for example, in planning estates and drafting wills. Here the instrument defining the terms of collaboration may affect persons not present and often not born. Yet here, too, the good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings.

3.

The Lawyer's Opportunities and Obligations of Public Service. Private Practice as a Form of Public Service.

There is a sense in which the lawyer must keep his obligations of public service distinct from the involvements of his private practice. This line of separation is aptly illustrated by an incident in the life of Thomas Talfourd. As a barrister Talfourd had successfully represented a father in a suit over the custody of a child. Judgment for Talfourd's client was based on his superior legal right, though the court recognized in the case at bar that the mother had a stronger moral claim to custody than the father. Having thus encountered in the course of his practice an injustice in the law as then applied by the courts, Talfourd later as a member of Parliament secured the enactment of a statute that would make impossible a repetition of the result his own advocacy had helped to bring about. Here the line is clearly drawn between the obligation of the advocate and the obligation of the public servant.

Yet in another sense, Talfourd's devotion to public service grew out of his own enlightened view of his role as an advocate. It is impossible to imagine a lawyer who was narrow, crafty, quibbling or ungenerous in his private practice having the conception of public responsibility displayed by Talfourd. A sure sense of the broader obligations of the legal profession must have its roots in the lawyer's own practice. His public service must begin at home.

Private practice is a form of public service when it is conducted with an appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government those voluntary forms of self-regulation already discussed in this statement. It is within this larger framework that the lawyer must seek the answer to what he must do, the limits of what he may do.

Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult. Judges are inevitably the mirrors of the bar practicing before them; they can with difficulty rise above the sources on which they must depend in reaching their decision. The primary responsibility for preserving adjudication as a meaningful and useful social institution rests ultimately with the practicing legal profession.

Where the lawyer serves as negotiator and draftsman, he advances the public interest when he facilitates the processes of voluntary self-government; he works against the public interest when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates.

Private legal practice, properly pursued, is, then, itself a public service. This reflection should not induce a sense of complacency in the lawyer, nor lead him to disparage those forms of public service that fall outside the normal practice of law. On the contrary, a proper sense of the significance of his role as the representative of private clients will almost inevitably lead the lawyer into broader fields of public service.

The Lawyer as a Guardian of Due Process.

The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

All institutions, however sound in purpose, present temptations to interested exploitation, to abusive short cuts, to corroding misinterpretations. The forms of democracy may be observed while means are found to circumvent inconvenient consequences resulting from a compliance with those forms. A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding cooperation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable coöperation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. This is a duty that attaches not only to his private practice, but to his relations with the public. In this matter he is not entitled to take public opinion as a datum by which to orient and justify his actions. He has an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process.

Without this essential leadership, there is an inevitable tendency for practice to drift downward to the level of those who have the least understanding of the issues at stake, whose experience of life has not taught them the vital importance of preserving just and proper forms of procedure. It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience. If the lawyer fails to do his part in educating the public to these dangers, he fails in one of his highest duties.

Making Legal Services Available to All Who Need Them.

If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate legal representation for those unable to pay the usual fees.

At present this representation is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the bar. If those who stand in need of this service know of its availability, and their need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself.

The moral position of the advocate is here at stake. Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being. The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel.

In discharging this obligation, the legal profession can help to bring about a better understanding of the role of the advocate in our system of government. Popular misconceptions of the advocate's function disappear when the lawyer pleads without a fee, and the true value of his service to society is immediately perceived. The insight thus obtained by the public promotes a deeper understanding of the work of the legal profession as a whole.

The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late.

The Representation of Unpopular Causes.

One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public.

Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. These safeguards are not designed merely to lend formality and decorum to the trial of causes. They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special summoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom. All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him. His chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are intended to prevent.

Where a cause is in disfavor because of a misunderstanding by the public, the service of the lawyer representing it is obvious, since he helps to remove an obloquy unjustly attaching to his client's position. But the lawyer renders an equally important, though less readily understood service where the unfavorable public opinion of the client's cause is in fact justified. It is essential for a sound and wholesome development of public opinion that the disfavored cause have its full day in court, which includes, of necessity, representation by competent counsel. Where this does not occur, a fear arises that perhaps more might have been said for the losing side and suspicion is cast on the decision reached. Thus, confidence in the fundamental processes of government is diminished.

The extent to which the individual lawyer should feel himself bound to undertake the representation of unpopular causes must remain a matter for individual conscience. The legal profession as a whole, however, has a clear moral obligation with respect to this problem. By appointing one of its members to represent the client whose cause is in popular disfavor, the organized bar can not only discharge an obligation incumbent on it, but at the same time relieve the individual lawyer of the stigma that might otherwise unjustly attach to his appearance on behalf of such a cause. If the courage and the initiative of the individual lawyer make this step unnecessary, the legal profession should in any event strive to promote and maintain a moral atmosphere in which he may render this service without ruinous cost to himself. No member of the bar should indulge in public criticism of another lawyer because he has undertaken the representation of causes in general disfavor. Every member of the profession should, on the contrary, do what he can to promote a public understanding of the service rendered by the advocate in such situations.

The Lawyer and Legal Reform.

There are few great figures in the history of the bar who have not concerned themselves with the reform and improvement of the law. The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order.

Where the lawyer fails to interest himself in the improvement of the law, the reason does not ordinarily lie in a lack of perception. It lies rather in a desire to retain the comfortable fit of accustomed ways, in a distaste for stirring up controversy within the profession, or perhaps in a hope that if enough time is allowed to pass, the need for change will become so obvious that no special effort will be required to accomplish it.

The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon an unwilling bar, the public's least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of his profession will, therefore, interest himself actively in the improvement of the law. In doing so he will not only help to maintain confidence in the bar, but will have the satisfaction of meeting a responsibility inhering in the nature of his calling.

The Lawyer as Citizen.

Law should be so practiced that the lawyer remains free to make up his own mind how he will vote, what causes he will support, what economic and political philosophy he will espouse. It is one of the glories of the profession that it admits of this freedom. Distinguished examples can be cited of lawyers whose views were at variance from those of their clients, lawyers whose skill and wisdom made them valued advisers to those who had little sympathy with their views as citizens.

Broad issues of social policy can and should, therefore, be approached by the lawyer without the encumbrance of any special obligation derived from his profession. To this proposition there is, perhaps, one important qualification. Every calling owes to the public a duty of leadership in those matters where its training and experience give it a special competence and insight. The practice of his profession brings the lawyer in daily touch with a problem that is at best imperfectly understood by the general public. This is, broadly speaking, the problem of implementation as it arises in human affairs. Where an objective has been selected as desirable, it is generally the lawyer who is called upon to design the framework that will put human relations in such an order that the objective will be achieved. For that reason it is likely to be the lawyer who best understands the difficulties encountered in this task.

A dangerously unreal atmosphere surrounds much public discussion of economic and political issues. The electorate is addressed in terms implying that it has only to decide which among proffered objectives it considers most attractive. Little attention is paid to the question of the procedures and institutional arrangements which these objectives will require for their realization. Yet the lawyer knows that the most difficult problems are usually first encountered in giving workable legal form to an objective which all may consider desirable in itself. Not uncommonly at this stage the original objective must be modified, redefined, or even abandoned as not being attainable without undue cost.

Out of his professional experience the lawyer can draw the insight needed to improve public discussion of political and economic issues. Whether he considers himself a conservative or a liberal, the lawyer should do what he can to rescue that discussion from a world of unreality in which it is assumed that ends can be selected without any consideration of means. Obviously if he is to be effective in this respect, the lawyer cannot permit himself to become indifferent and uninformed concerning public issues.

Special Obligations Attaching to Particular Positions Held by the Lawyer.

No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves.

Two positions of public trust require special mention. The first of these is the office of public prosecutor. The manner in which the duties of this office are discharged is of prime importance, not only because the powers it confers are so readily subject to abuse, but also because in the public mind the whole administration of justice tends to be symbolized by its most dramatic branch, the criminal law.

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Special fiduciary obligations are also incumbent on the lawyer who becomes a representative in the legislative branch of government, especially where he continues his private practice after assuming public office. Such a lawyer must be able to envisage the moral disaster that may result from a confusion of his role as legislator and his role as the representative of private clients. The fact that one in this position is sometimes faced with delicate issues difficult of resolution should not cause the lawyer to forget that a failure to face honestly and courageously the moral issues presented by his position may forfeit his integrity both as lawyer and as legislator and pervert the very meaning of representative government.

Mention of special positions of public trust should not be taken to imply that delicate moral issues are not confronted even in the course of the most humble private practice. The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments. In apportioning his time among cases already undertaken the lawyer must guard against the temptation to neglect clients whose needs are real but whose cases promise little financial reward. Even in meeting such everyday problems, good conscience must be fortified by reflection and a capacity to foresee the less immediate consequences of any contemplated course of action.

III.

To meet the highest demands of professional responsibility the lawyer must not only have a clear understanding of his duties, but must also possess the resolution necessary to carry into effect what his intellect tells him ought to be done.

For understanding is not of itself enough. Understanding may enable the lawyer to see the goal toward which he should strive, but it will not furnish the motive power that will impel him toward it. For this the lawyer requires a sense of attachment to something larger than himself.

For some this will be attainable only through religious faith. For others it may come from a feeling of identification with the legal profession and its great leaders of the past. Still others, looking to the future, may find it in the thought that they are applying their professional skills to help bring about a better life for all men.

These are problems each lawyer must solve in his own way. But in solving them he will remember, with Whitehead, that moral education cannot be complete without the habitual vision of greatness. And he will recall the concluding words of a famous essay by Holmes:

> Happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

A A L S Representatives to the Joint Conference
- LON L. FULLER, Harvard University, *Chairman*
- HARRY W. JONES, Columbia University
- JOSEPH F. RARICK, University of Oklahoma
- DON W. SEARS, University of Colorado
- LEWIS M. SIMES, University of Michigan

A B A Representatives to the Joint Conference
- JOHN D. RANDALL, Cedar Rapids, Iowa, *Co-Chairman*
- A. JAMES CASNER, Cambridge, Massachusetts
- HOMER D. CROTTY, Los Angeles, California
- SHELDEN D. ELLIOTT, New York, New York
- ALBERT J. HARNO, Los Angeles, California

The Black Law Student

A problem of fidelities

There is one lawyer for every 637 persons in the United States, but only one black lawyer for every 7000 blacks. Many changes —in attitudes, in curricula, in objectives— need to come before that blatant inequity is reduced. The author earned a law degree from Harvard, taught at the University of Iowa, and toured Southern campuses for qualified black law-school candidates to accumulate the facts and impressions that make up this singular study of the tough choices that face the blacks who need the law and the whites who run the machinery that produces lawyers.

To return to the South causes a black man to feel both proud and embarrassed. The pride comes when he assesses the fruits of his migration and recognizes what he presently is; and the embarrassment comes later, during his stay, when he becomes aware that he is seeking, in the minds of the people he left there, some remembrance of what he was. I went back as a recruiter of law students and tried to recall myself as I had been almost four years before, when I first began to consider the law. In a black college, not nearly adequate but bulging with identity, I sat and thought about it.

I remember that a man from Howard Law School came and looked at my grades, and then assured me that there was money enough for me and room enough for me if I wanted to go. I considered it. I found some Blackstone and read. From someplace, perhaps from my reading of Galsworthy, came the idea that lawyers began by reading Blackstone. A man from Stanford Law School came recruiting, and I told him that I had already read some Blackstone. He laughed, and said that there was money enough and room enough at Stanford for me. I felt pretty damn important. Then a man came down from Harvard, an extremely kind man, who looked at my grades and at a part of my mind, and then said there might be money enough and room enough for me at Harvard. And a month later a letter came which offered me a seat that, but for the fact that the nation's conscience had been pricked, might very easily have been filled by an eager genius. I felt very valuable.

Four years later, armed with what had been offered me, I went back to the South looking for myself, and for students for the Iowa Law School. I looked in ten black colleges, but I did not find my face on the students I saw and I did not hear my questions in their voices. Today the campuses are tight. Students are attempting a lonely, painful, seemingly uncertain assessment of themselves. The times have helped them to know their worth, in spite of the deficiencies in their academic preparation, and the questions they put to me were not the ones I asked four years ago.

"How is law school relevant to the immediate needs of the black community?" a sun-shaded, dashikied senior at North Carolina A & T asked.

"If I knew the whole answer to that," I told him, "I would have an office in Washington now."

But, characteristically, he did not laugh; and I knew that a quip would not be good enough. And so I fell back on the documents. I told him that blacks constitute over 10 percent of the national population, but only one percent of the National Bar Association. I said that there is one lawyer for every 637 persons in the United States, but only one black lawyer for every 7000 black persons. I noted that half of the blacks in the country live in

by James Alan McPherson

the South, but only 15 percent of the black lawyers practice there. To astonish him further with statistical evidence of why he was needed, I observed that in the South every black lawyer must serve 28,500 black people. But more than this, in Mississippi, there are only 6 black lawyers for a black population of 900,000. But still, I felt that this was not enough of an answer to his question; and I think that he must have felt my embarrassment because he did not press me further for an answer.

"I don't want to go to a white law school," a junior at Southern University told me. "I plan to go to the law school here."

He wants to be a corporate lawyer, he says, and he wants to make money. He is being honest, and he knows that the only real equality is economic equality. Again there is a painful, irrepressible question to avoid. With all its dedication, with all its intellectual resources straining, the Southern University Law School will never be able to guide this junior to the money-mills of Wall Street, where he wants to be. But how could I tell him this without offending the very delicate sense of racial pride so important and sensitive and protective to all of us?

"Why don't you want to go to a white school?" I asked the unavoidable question.

"I know what happens to black students in them," he said. "They get so lonely they go crazy. I'd rather stay here."

"At the better law schools the Wall Street firms come and beg black students to apply for jobs," I told him.

"I want to stay in my own community."

"For how long?" I asked. He did not answer. "I went to a white law school, and I survived it," I said. "I'm still black and I'm still sane."

He sat looking at me, and his eyes were so close to accusation that I almost felt compelled to add, "I think."

If I had had the time and the words and the necessary hard rationality, I would have attempted to prove to him that it is possible to endure, maintain a sense of oneself, and even do well at a white law school. But I was not certain of what the real problems were. And I was equally uncertain of whether *I* truly believed what I wanted to tell him. So I offered no explanations, no personal experiences for illustration, and he finally went away while I waited for more seniors to come in. They came, but the same question came back at me; and I was still unable to make a sufficient answer. Why should some of these students fear attending a white law school, one that was actively recruiting them with special considerations and the promise of a monied future? What are they afraid of losing?

The obvious answer is, of course, their identity. But having said that, one must admit that the question is still unanswered. There are layers, very delicate, almost imperceptible levels, to this identity problem. One must consider, individually, the legal profession, the vocabulary of the times and its effects on certain members of the black minority group, the black law student, his law-school environment, his reaction to it, and its reaction to him.

I am often told by militant friends that law is a racist profession. And the use of this emotive word is not totally inaccurate, it is argued, because its meaning can be refined to suggest that the study of law assumes a certain affinity for and a certain fidelity to already existing economic, political, and, to some extent, cultural institutions. And these institutions were shaped, for the most part, by members of the majority group for the benefit of their group. This is not to suggest that the focus of the legal profession is fixed and incapable of serving the interests of other cultural groups, but rather that ethnic groups which are politically and economically below the majority group cannot take a similar view of the profession as a protective discipline or of the lawyer as a protector of vested interests. This comfortable position can be enjoyed only by those who have vested interests for lawyers to protect. Members of the black community, for example, may view the law as nothing more than a weapon with which they can effect certain social changes, forge room for themselves on the social scale, and create some vested interests in the institutions already established by the majority group.

The area of civil rights and civil liberties has, historically, been the only level of the legal system on which blacks have had some direct impact or have claimed a vested interest. Most black lawyers have operated in the courts, but courtroom litigation is only a very small part of the legal arena, and most white lawyers spend very little time there. In the larger society, the lawyer works for firms, great and small, for business, and for government: three areas which only recently have made any sort of job offers to the relatively small number of blacks with legal training. To oversimplify the point, one might say that in the past the white lawyer has been able to walk out of law school into what one might call his father's firm, while the black lawyer has usually had to make his living on the fringes of the preserves maintained by the large cultural group. One might even call him the real ambulance-chaser of the legal profession.

The black minority has not yet developed its own institutions to the extent necessary for equal participation, competition, and interest in a society which can never really respect or assimilate a minority group without developed economic, political, and cultural foundations. Blacks, apparently, have only recently come to the realization that independent growth is essential before there can be any talk of real equality. This is why there is at present a massive drive to promote black business (or better, black capitalism); this is why blacks are attempting to fill as many political offices as are available; and this is the reason behind the great surge, on every level of black society, to claim and develop everything which contributes to a sense of cultural identity. Perhaps because of a historic concentration on constitutional law by black lawyers as a method of forging room for this development, or perhaps because of riots or intimations of a possible race war, the larger society is slowly making room for, or is at least willing to open its institutions to, certain educated minority members. And, between the recent assertions of the black group and the recent willingness of established white institutions to "open" and admit competent blacks lies the very first level of the black law student's "identity problem."

When most blacks were excluded from the major law schools and the major receptacles of good legal training, the idea of black cultural identity was easily maintained, perhaps as one of the advantages of the disadvantages. But with the best law schools recruiting and with more job opportunities available, and since there are not nearly enough black firms or businesses to accommodate potential graduates, the black law student has a torturous decision to make: should he work for an institutional order in which his people do not yet have a sound enough investment to make his work relevant to their needs, or should he strike a compromise with himself—with certain of the skills he has acquired which have made him serviceable to the institutions of the greater culture—and return to a poor, black community, where there is much building to be done, to do what those black lawyers who did not have his options were forced to do? The skills have been developed by the time he completes his studies; the money is tempting; and who can condemn the black lawyer who chooses the most financially profitable option? There are those to whom the sense of social obligation, the idea of a truly equal black minority, is more worthwhile. While the black student is just as eager to learn the law as his white classmates, I suspect that all during law school he must consider these options.

The whole movement to recruit black students for legal training grew out of a recognition that there was a serious underrepresentation of black lawyers in the national bar, and a very serious shortage of black lawyers in the South. Prior to 1964, there were very few black college graduates entering the major law schools. One of the obstacles which kept them out, if we ignore for a moment the reputedly poor educational facilities of many Southern black colleges, was their inability to perform well on the Law School Admission Test (called LSAT). A respectable score, I understand, is 650 to 700. Every testee is given 200 points for signing his name, but somehow, black students have managed to score as low as 214.

However, working from the assumption that test scores do not necessarily predict how well a person, any person, may do in law school, the American Bar Association, the Association of American Law Schools, the National Bar Association, and the Law School Admission Test Council joined together in 1968 to sponsor the Council on Legal Education Opportunity (called CLEO). The stated aim of the Council was to help "culturally deprived" college juniors—blacks, Mexican-Americans, and American Indians—to consider law as a profession and to apply to law schools. One of the better ideas of the council was to recruit additional students for the profession and leave the consideration of their LSAT scores to the law schools which might accept them.

As early as 1965, Harvard Law School, with financial backing from the Rockefeller Foundation, had attempted to judge the abilities of black law-school applicants by setting up a "Special Summer Program." This experimental program was modeled, on a much smaller scale, after the actual academic conditions of the Harvard Law School; and forty juniors and a few seniors from Southern black colleges were given introductory courses somewhat like those taught to first-year law students and competed with white students in courses in the Harvard Summer School. Most of the forty students did well: in fact, there were three A's and quite a few B's reported from the summer school courses, although it is interesting to note that one of the students suffered a nervous breakdown at the end of the session. Still, the Special Summer Program was successful. By 1968, there were four such programs being conducted: at Emory University in Georgia, at the University of Colorado at Denver, at UCLA, and at Harvard. Professor David W. Robinson of the University of Texas Law School, who taught in the CLEO program at Emory during the summer of 1968, concluded that "the LSAT is presently useless as a predictor of law school performance for graduates of Negro colleges. I can't tell you why," he said, "but I am trying to find out."

To ensure a steady flow of black students into law schools, which now welcome them with open arms and wallets, the Council on Legal Education Opportunity has requested funds from the Office of Economic Opportunity. CLEO estimated that it would need approximately $2,500,000 to help fi-

---

Mr. McPherson is a contributing editor of the *Atlantic*, in which he has published several short stories and a comprehensive report on Chicago's Blackstone Rangers. His prizewinning collection of stories, *Hue and Cry*, was published in 1969 by the Atlantic Monthly Press.

nance a minimum target group of 500 blacks, Indians, and Mexican-Americans through law school by 1973. This figure does not include tuition, which CLEO hoped might be contributed by the law schools themselves, or through funds raised by them. And although even this minimum sum has not yet been raised, it is safe to assume that many more black students will have to face mentally exhausting study pressures and psychologically exhausting environmental pressures. How students react to their studies, I believe, is directly related to how well they endure these pressures. And it is with certain of these pressures that I am concerned here.

It has always bothered me that three very bright black students, two from excellent Ivy League colleges and the third from one of the best black colleges, flunked out after our first year at Harvard, while those of us from black colleges of rather dubious academic repute managed to survive. One of the men obviously preferred to read literature much more than to read law. The other two had a very keen sense of obligation to what was called in those days "the civil rights movement." Both had been highly active in civil rights affairs before coming to law school—in fact, one man came to Harvard directly from a Mississippi jail—and both worked in civil liberties organizations at the law school during that first year. All three men had had extensive experience in predominantly white situations. They studied, they attended classes, they discussed the issues, like all of us; but at the end of the first year their final grades required the faculty to send them away. Did they really study, or did they actively, perhaps painfully, go through the motions of studying without the desire to digest what was before them? Were they psychologically prepared to give themselves over entirely to the study of civil procedure, contracts, thirteenth-century property law, and the ponderous history of the English legal system? Here one must consider the word "relevance."

Were these two men looking for some immediate relationship between subjects which required most of their time and the social situations which they had agreed to leave for a while? If one assumes that they sincerely sought relevance, it is possible to see, or at least to speculate on, why they did not succeed during that first year. The answer seems simple: they failed to recognize that the study of law has no immediate relevance to the black community. It is almost pure study. The real relevance comes only *after* the period of training, when the individual student has to decide for himself what role he wants to play with the tools he has acquired. At this point, it seems to me, the law becomes most relevant. But it is not the duty of the school or the professors to make it meet the needs of the black minority; the duty belongs, as it always has, to the individual law student. He must create or advance the relevance he calls for. But for those who cannot endure three years without an answer, for those who cannot rationalize the long-range relevance of the necessary bread-and-butter courses, there is little possibility of devotion to subjects that promise nothing immediate but require nothing less than the highest fidelity. And the counterfidelity of the black student, suggested by such words as "relevance" and "black," sometimes keeps him at an unhealthy distance from that which the academic situation requires as the object of all his affections. Thus, there is a dual fidelity: one dictated by the study itself and the other by a sense of cultural obligation and the mood of the community.

This ambivalence, if it can be called that, seems to be the product of the student's reaction to considerations that are externally imposed on him. In essence, it is a reaction to the mood of the black people beyond the campus and a reaction to his sense of the white people who surround him on the campus. If, for example, consideration of the words "black" and "relevance" causes him to measure the significance of his studies against the significance of the more active roles taken by other blacks far removed from the academic life, the student will, logically, turn to his peers—law students, black and white—for some reinforcement; some indication that his choice of intellectual weapons was a correct one. For, in reality, he has chosen to make his emotional reactions secondary to his intellect. But if his peers, his white classmates especially, choose to reinforce his emotional assessments and ignore those made by his intellect, the student will, inevitably, go through a period of self-doubt, guilt, and re-evaluation of the community's conception of him. To support this generalization, I offer an example.

One December night a black girl who had entered law school during my second year telephoned me at 2 A.M. and said that she was, at that moment, running around in the basement of the graduate women's dormitory in her gym suit. She wanted to go for a walk, and I dressed and met her at the dormitory. She is a brilliant girl, and at that time she was what some of the more aware black students at the law school called "the Black Hope" (meaning that she was one of the few blacks whom the faculty expected to make *Law Review* after exams). She had attended one of the best colleges in the country, had made Phi Beta Kappa, and had many of us, both black and white students, just a bit envious of her rumored LSAT scores. Already there were stories floating around the campus of her well-reasoned comments in class. She had just joined the Black Law Students' Association, which was formed that year, and was at the time more active on its behalf than its founder. She was doing exceptionally well, and yet she could not sleep at night.

"Do you think I'm stuck-up or snobbish?" she asked me as we walked.

"No," I said. "Why?"

"Some of the girls in the dorm say that," she said after a while.

We went on to a restaurant and had coffee, and watched a fistfight.

"What do you think of the whites?" she asked.

I gave my opinions. Then I asked, "Are you having trouble with them?"

Her answer was evasive and suggested that her ideas were being polarized and that she was beginning to question the fidelities which had brought her, an open, mild-mannered person, as far as law school. I attempted to be wise by observing that attending law school was like moving into an all-white neighborhood: one is interested in the house, I said, not the neighbors.

I began to watch her after that night, and I began to notice her transition from a happy, gregarious person to a tight, brooding creature of fantastic racial sensitivity. If she had been comfortable in an almost-white situation before coming to the law school, which was the impression she gave at first, she was now becoming more and more conscious of her blackness. During her second year she became increasingly active in the Black Law Students' Association; she moved out of the dormitory and into an apartment with two other black girls and a white girl, but the white girl soon moved out. At one point she stopped attending classes. Sometimes, when I caught sight of her on campus, she would be so preoccupied that I would have to touch her before she spoke.

And so I was not really shocked, a little over a year after our December walk, when she told me that she was leaving law school.

"Why are you leaving?" I asked while following her into a bank.

"This is a racist place," she said.

"Of course it is," I said. "But you came for the degree. Blacks are working on degrees at the University of Mississippi."

"I don't want it," she said. "I just want to get out of this place tonight." I offered my best wishes and left her to close her account.

The fact that she left in the middle of the school year caused the faculty some concern because, unlike the three men who had left after their first year, she had already demonstrated her ability to do well. Perhaps she was right when she said that the law school is a racist place: I would not attempt to argue that it is not because there are too many people and too much diversity of attitudes. But I think that it would be safe to say that the girl had never been "all black" before that first year, and that the motivation to adopt this attitude was partially voluntary and partially caused by those peculiar animals called white liberals. The fact that the girl found a good number of her friends among whites during her first year, and the fact that she was violently opposed to any sort of contact with them just a year later, suggests that whites complicate the overall "identity problem" of the black student by supplying the wrong kind of reinforcement.

To me, there are two kinds of liberals: the type of fellow who would take off his coat in a snowstorm and put it around my shoulders, and the type of fellow who would caution me to wear a coat against the snow. And I prefer the latter to the former simply because he is real and may be genuinely concerned over my keeping warm, whereas the former is concerned with suffering from the cold himself for my benefit. At best the liberal is a well-meaning, socially active, sympathetic person; at worst he is a constant, convenient whipping boy for blacks who may have need of some sort of scapegoat. But much more than this, the serious liberal may function as an external reminder to blacks that they are out of their proper cultural environment; and some of the more fawning liberals seem to enjoy noting that they have taken upon themselves the obligation to make blacks comfortable in that alien culture. This self-imposed obligation only fosters a sense of specialness for those reluctant beneficiaries of well-intentioned paternalism. And the attempts to maintain a controlled environment tend to make a black man feel that he can never become just another law student, or a competitive face in the academic crowd.

The word "liberal," like the words "racist" and "black," is impossible to define adequately because of the many levels of meaning invested in it. The black student who has no working definition can only fix certain types of activity with the label, activity which could range from an almost pathological concern for the welfare of black students to the insidious practice of cornering a single black person at a party, sometimes special parties, with the inevitable inquiry: "How does it feel?" The real test of a white law student's friendship and respect for the intellectual abilities of his black classmate, I believe, is indicated by the types of subjects on which he solicits the ideas of the black. If the source of all his questions is ultimately a hunger for ideas on racial matters when both students are studying the same subjects, perhaps having the same difficulty and needing the benefit of some mutual intellectual exchange, it is a fair assumption that the white student sees no further into the black student than his skin and may have little respect for his intellect or his ideas of what the law is all about.

Characteristically, the liberal seldom gets mad; even when he has overwhelming justification, even when it would be much healthier for both parties, black and white, to express some honest anger. This omission is a special kind of racism, special in the sense that it refuses to recognize the human weakness of the black, his right to be wrong or petty or to have an offensive personality. The white who refuses to recognize this in the name of liberality is making a substantial contribution to an already tense situation because he is doing the very same thing as the racist-hunting black: he overlooks weaknesses that are necessarily human, denies a man the right to be only what he is and no more than that, and perpetuates his anxiety. This kind of white helps no one, least of all himself, and only feeds the feeling of blacks that everything is being controlled for their benefit. The white student, or professor, who hesitates to criticize in class the sloppy reasoning of a black student keeps alive the idea that the black student is being subsidized, intellectually, and cannot be expected to meet the standards set for other students.

Given over to the whims of this peculiar animal, is it any wonder that blacks attempt to establish some sort of separate cultural enclave, or semi-political grouping, as soon as they are in sufficient number on a white campus? For once they have accepted an unreal social life based on this sort of overintentioned paternalism, they have no choice but to become "kept" representatives for the millions of blacks who have their own minds and their own ideas of how they want to live and what they are. In essence, the acceptance of this peculiar relationship subtly robs the student of his individuality and forces upon him a responsibility which he may have chosen to postpone for at least three years, or, perhaps, one that he has chosen to ignore altogether. The liberal, therefore, tends to remind the black law student of his dual fidelity. It seems to me that if black law students are going to be constantly reminded of their racial obligations, a better alternative would be for them to remind themselves. And it seems that they have found a way to do it through the development of black cultural enclaves.

While I doubt if the continued growth of Afro-American Student Associations could ease most of the frustrations caused by the black student's "identity" problem, I do think that they make substantial contributions toward that end. Besides providing the black law student with some immediate focus for the legal skills he is acquiring, they also give him a sense of cultural presence on the white campus which helps to decrease feelings of isolation and loneliness. They are collective, cultural islands on which black students in a dubious transition can pause and assess themselves, and their direction, before moving on. Also, they enable the black students to have their own sphere of social activity, if they choose to, thus preserving them from what may be a very painful assimilation into the culture around them. Whether this self-segregation is good or bad is a judgment beyond my competence. It can be said, however, that Afro organizations allow the students to maintain some sense of independence and perhaps reduce their feelings of specialness on a campus which, sometimes, views them as guests. Occasional cocktail parties given by concerned faculty members are not sufficient; and neither are tutors, liaison personnel, or group therapy meetings at which blacks can vent their frustration on liberal professors and students. All of these attempts have behind them the suggestion of dependency, and there seems to be a very real relationship between the amount of anxiety among black students and the extent of the dependency they have on the whites who desire to help them. This feeling can be reduced only when there are enough blacks on white campuses to establish an interdependent, self-sufficient black community.

Any thorough discussion of the academic problems caused by the recruitment of black law students should, of necessity, come from the academic side of the desk. But certain of them are essential to the problem under consideration here, and ought to be explored. Many black students are recruited by law schools, and in many cases LSAT scores and even freshman- and sophomore-year grades are not given primary consideration. In essence, the schools look only at the strongest indication of a black student's ability in order to make their judgment of his prospects. If a student with serious academic handicaps is admitted, they expect that he will not do very well. The hope of most law schools is that the black student can manage to meet the minimum academic requirements; that is all that is expected of him, and law schools take every precaution to ensure that he is financially secure enough to devote most of his time to study. And to ensure that the students get the maximum benefit from their studies, some law schools supply tutors during the first year. While this is a very generous policy from an academic point of view, it sometimes serves to reinforce the student's feeling that he is special and that, in spite of his intentions and all his drive to compete with his white classmates, there is a presumption that he lacks the ability to function on his own. And this presumption is especially painful for the black student who has a competitive college record and a fair LSAT score. In this situation it is possible for him to feel that he has been judged by the presumption and is being pushed, unfairly, into an intellectually embarrassing category.

During my first year of law school some of my black classmates, some from the best Ivy League colleges, were pressured, along with those of us from less respectable colleges, to accept tutorial assistance. There was a good deal of resentment, even though the help might have been needed by some of us. There were seventeen black students in my law school class, and we were all scared; perhaps more than the white students. Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and, like certain members of the faculty, had developed paternalistic attitudes toward us. The silence, the heavy sense of expectation, fell on all of the blacks in a classroom whenever one of us was called upon for an answer. We waited, with the class, for the chosen man to justify the right of all of us to be there. And the busy silence between the time a black student was called on and the time he began to make an answer was alive with all our answers being pushed, by sad attempts at some kind of empathy, from all sections of the huge room to the mind of the man who, for the moment, represented all of us. The rest of the class would wait sometimes, and embarrassed white faces would turn away while the instructor repeated the question, and papers would rattle in signals of sympathy. And when an answer came, however poor it was, there would be relief visible in the faces of the white students and the instructor, and audible in the renewed breathing of the rest of the black students. After class, the student who had been called on, and a few of his friends, might walk hurriedly down the hall; the black student perhaps apologizing, perhaps rationalizing his inability to give a better answer. At such times it would not be unusual for a white friend to say, "I'm glad he didn't call on me. I couldn't have answered *that* question myself." But it would be very unlikely that the black student would agree.

I cite this not as an example of the black student's inability to compete successfully with his white classmate, but rather, as an example of the psychological pressures on him to work even harder than his white classmates and to take every minor defeat much more seriously than it ought to be taken; to invest in it certain racial implications. There were many white students who could not give adequate answers to questions put to them; but I suspect that none of their white classmates felt that their own intellectual equipment was being measured by the performance of these people. Black students, however, *do* feel this relationship, and how this sense of communal inadequacy can be lessened is a consideration beyond my competence. It is a problem that should rightly haunt law school administrations, just as the problem of what to do with black students who are really inadequate presently haunts them. My own feeling is that because of his minority status in the law schools and because of pressures on him from both communities, the black law student is fearful of expressing himself, or of viewing himself, as an individual. And therefore, he feels responsible for the welfare, the ideas, even the image of those around him like himself. Until there are enough competent blacks in law schools to make each student feel sufficiently secure in his status, to assert himself and to feel responsible for only himself, this problem will continue.

In regard to the divided loyalties of blacks, one can only hope that the profession itself will eventually reduce the conflict between the moral attraction of the black community and the financial attraction of the conventional employers of legal talent through such agencies as Community Legal Assistance Offices, integration with other disciplines which deal with urban problems, special concentration in areas such as rehabilitative programs in prisons and mental institutions, and other areas which involve direct contact with people. The profession has no choice in this matter: even now white law students are saying that the real work must be done outside the established preserves. And some law schools, Harvard and Yale, for example, already have such programs under way. On the other side, the black student must realize that whatever choice he makes, he has the right to make it as an individual, and that the consequences of his decision are his alone.

There are no statistics on the number of black law graduates who return to the South. Perhaps these are not necessary. But what should be measured is the number of black law graduates who opt for the high positions for which they have been trained, and their reactions to such employment. It is my suspicion that no matter where they go, no matter how they function, if they are still in a minority status they have to cope with the very same problems: the ambivalence, the question of relevancy, the paternalistic patterns. There is no escaping, and there never will be until either black institutions are developed enough to absorb their own people or black lawyers are in sufficient number in the white preserves to create the important sense of community and common direction. But this will take time.

And then there is the problem of enduring while in law school. To suggest some solution one must consider the reasons why black students have been so eager to accept the invitations and money extended to them. My suspicion is that many students want to become lawyers, and many view the law as a valid means of making a contribution to the cultural expansion of the black group. But—and this is a reason that few black students will admit—for some the opportunity provides only the chance to prove that they are intelligent, that they are intellectually capable of competing with the best that white society sends to the battle. Three years of hard work during which one's true interests are only secondary is a terrible price to pay just to refute a false assumption. And making the student feel special, placing him in a category which takes intellectual limitations for granted at the start of the ordeal, only makes his struggle that much harder, and much more painful.

Could law schools recruit more black students but become more selective in their admissions policies, thus enabling them to drop all such categories? There is a great intellectual potential in the students coming out of black colleges these days; I saw it in their perceptions and questions on campuses all over the South. Would it be too hard on the law school personnel and the white students to recognize each black class member as an individual? The fact that some white students are beginning to react to what they consider overcompensatory accommodations for black students may suggest that the use of black students as a source of private purgation is almost over. And what comes after this?

As for the vocabulary, the majority group's expectations, the black students' attempts to establish some sort of collective identity on a white campus, these can be adjusted only with time and understanding and a recognition that munificence, no matter how well intentioned, is still directly related to the ability of the donor to recognize the consequences of his act and the intellectual and emotional capacity of the recipient to perceive whether what he has been offered is truly of any value to him.

There was a girl in Chicago at a conference of black law students last May, a black girl from Alabama who had been a classmate of mine. I sat next to her at dinner, and saw a reflection of my own rootlessness and uncertainty in her eyes. There was an impulse in me to ask a question, to test some part of my present self against some part of her, just to see if we both were still what we were three years ago. She was on her way to Atlanta to work in a Community Legal Assistance Office. There was a kind of commitment to law in her, and I felt like a traitor. We had both walked dirt roads in the South, and she, at least, was trying to go home. I asked her, "Are you happy now that it's all over?"

She used to be a laughing girl, full of that spontaneity so characteristic of Southern black people. But she had lost that. And after thinking awhile, she said, "No. But now I know that there's no white man in the world who can say that I'm dumb."

It is a great pity, and most of the real problem, that so much of any person's life and mind and energy should have to be spent in refuting, or retreating from, something as ephemeral as a false assumption. ☐